No. 334.
Brf. of Johnson & Clark for P. & C.
Filed Oct. 8, 1898.

Office Supreme Court, U. S.
FILED
OCT 8 1898
JAMES H. McKENNEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 334.

WATERS-PIERCE OIL COMPANY, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFF IN ERROR.

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PRESS OF NOBLE BATTLE, WACO.

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STATEMENT OF THE CASE.

On February 5th, 1896, the State of Texas instituted its action against the Waters-Pierce Oil Company and certain agents of said company in the District Court of Travis County, Texas, for the purpose of canceling the permit theretofore granted by said state to said company, which company was a foreign corporation incorporated under the laws of the State of Missouri, to do business in the State of Texas, and to adjudge a forfeiture of its right to do any business in the State of

Texas by reason of alleged violations by said company and its agents of two certain statutes of the State of Texas generally known and styled as the "Anti-Trust Acts" of said state, the first of said acts having been enacted on March 30th, 1889, and the other on April 30th, 1895. These acts are as follows:

"CHAP. 117. (S. H. Rs. Nos. 9, 117, 136, 192, and 313.) An Act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas.

SECTION 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by which two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First, To create or carry out restrictions in trade. Second, To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third, To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth, To fix at any standard of figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce, intended for sale, use, or consumption in this state. Fifth, To make, or enter into, or execute, or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the attorney-general, or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the state, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney-generul to enforce this provision by injunction, or other proper proceedings in the district court of Travis County, in the name of the State of Texas.

SEC. 5. That the provisions of Chapter 48, General Laws of this state, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. Any violation of either or all the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written

instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

SEC. 9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act which do not in their commission necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

SEC. 10. Each and every firm, person, corporation, or association of persons, who shall in any manner violate any of the provisions of this act, shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense was committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general, or the district or county attorney, to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

SEC. 12. That the provisions hereof shall be held cumulative of eachother, and of all other laws in any way affecting them now in force in this state.

SEC. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

SEC. 14. Whereas, the people of this state are without a remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule, which requires that all bills shall be read on three several days, be suspended, and that this act shall take effect from and after its passage, and it is so enacted.

(NOTE.—The Foregoing act originated in the house, and passed the same by a vote of 86 yeas, no nays; and passed the senate by a vote of 26 yeas, no nays.)

Approved March 30, 1889."

"CHAP. 83. (H. B. No. 404.) An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to

promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act.

SECTION. 1. Be it enacted by the Legislature of the State of Texas, "That an act entitled, "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889, be so amended as to hereafter read as follows:

SECTION 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard of figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

5. To make or enter into, or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article of commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity of transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the

laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney-general or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the State where such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney-general to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the State of Texas.

SEC. 5. That the provisions of chapter 48, General Laws of this state, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. If any person shall be or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either any or all of the following purposes:

1. To create or carry out restrictions or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of,

or transport any article, or commodity or article of trade, use, merchandise, commerce, commerce or consumption, below a common standard figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations, shall be punished by fine of not less than fifty nor more than five thousand dollars, and by imprisonment in the penitentiary of not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputa- as such.

SEC. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not, in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

SEC. 10. Each and every firm, person, corporation or association of persons who shall, in any manner, violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of

fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general or the district or county attorney to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable, either in law or equity.

SEC. 12. That the provisions hereof shall be held cumulative of eachother, and of all other laws in any way affecting them now in force in this state: Provided, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

SEC. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the state to recover penalties, or to affect the right of the state to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this State, or to affect the right of the state to maintain prosecutions for vjolations thereof, under any law of this state relating to trusts, for acts heretofore done.

SEC. 14. Any court, officer or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury may subpœna persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections, about which he may testify fully and without reservation.

SEC. 15. All laws or parts of laws in conflict with this act are hereby repealed.

SEC. 16. Whereas, the people of this state are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule, which requires that all bills shall be read on three several days, be suspended, and it is so enacted.

Approved April 30, 1895."

After answer filed by defendant company, to-wit, on May 12, 1897, the State amended its original petition and made the following allegations as grounds for forfeiture:

1. That the Waters-Pierce Oil Company had complied with the laws of the State of Texas with reference to foreign corporations and had secured a permit in accordance with said laws to transact business in said State for the term of ten years from July 6, 1889, and that since said date, it, said company, had been transacting business in Texas in the sale of illuminating and other oils.

2. That in pursuance of unlawful combinations between said Waters-Pierce Oil Company and the Standard Oil Trust, of New York, it had divided the State into five grand divisions, appointed an agent for each of such divisions, and with many local agents throughout the cities and towns in the state.

3. That on the second day of January, 1882, a great many firms, partnerships, individuals and corporations had entered into a trust agreement with reference to the manufacture, refining and sale of oils in the City of New York, and setting out what is known as the Standard Oil Agreement in full, which agreement bears date on said day.

4. The State further averred that the real object, purpose and intent of said firms, partnerships, individuals and corporations in making said agreement was to control and monopolize the petroleum industry in the United States and the several states, and that by the making of said agreement there was created a combination of capital, skill and acts for the purpose of effecting such monopoly, following the language of the Texas statutes as to the purposes named.

5. The State further set forth various allegations with reference to said Standard Oil Trust which need not be more particularly stated here, except that it was alleged that the United States was divided into various subdivisions, and that the following territory, to-wit, Southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory, and a part of Louisiana, was assigned to the defendant company for its operation under

the trust. It was also averred that the defendant company, the Waters-Pierce Oil Company, became a party to said trust agreement and since the 6th day of July, 1889, the date of its permit to do business in Texas, said company had in the State of Texas, by and through its agents, being the other defendants named, and numerous local agents in Texas, had observed, performed and carried out the purposes, objects and policies of said trust agreement, alleging among other things as to the conduct of the Waters-Pierce Oil Company in effectuating said trust, that it established in various localities in Texas warehouses, tanks and other depositories for the storage and reception of its oils; that it shipped its oils into Texas consigned to its managers and other agents, which oils were stored and sold to merchants and dealers in such quantities as the buyer desired to purchase. It was alleged that the State did not know the exact time at which the Waters-Pierce Oil Company became a party to said trust, but that since the date of its permit to do business in Texas the company had observed, performed and carried out said trust agreement and is still doing so in the following manner: that a sufficient number of shareholders of the defendant company, including some of its officers and directors, had entered into said trust agreement without attaching corporate name and seal of said defendant company thereto and the official designation of its officers; and that upon entering into said agreement in manner aforesaid, a sufficient number of shares in defendant company's capital stock had been transferred to the Standard Oil trustees in accordance with the provisions of said trust agreement, to enable said trust to control the operations of the defendant company, and that in lieu of said shares, trust certificates had been issued to said stockholders in an amount equal to the appraised value of the stock so transferred. It was further charged that the Standard Oil trustees in addition to such acquisition of shares of capital stock, had purchased other stock and bonds of the Waters-Pierce Oil Company, sufficient to give

it control of said corporation and to enable the Standard Oil trustees to exercise a supervising and controlling authority over the affairs of the Waters-Pierce Oil Company and the management, conduct and control of its business; and that since July 6th, 1889, the date of defendant's permit, the Standard Oil trustees were able to, and did control the action of the Waters-Pierce Oil Company in the selection of its officers and irectors and in the conduct and management of its business in Texas, and that the Waters-Pierce Oil Company had never taken any corporate action or made any complaint against said stockholders, directors and officers signing said trust agreement, nor against the stockholders nor officers surrendering or canceling their stock to the Standard Oil trustees, nor against any of the acts recited, nor had any objection or complaint been made to the officers, directors or stockholders of the Waters-Pierce Oil Company against such surrender and exchange of stock, but that the defendant company acquiesced in such transfer and exchange, control and supervision, and that the directors of the Waters-Pierce Oil Company managed the business of said company so as not to conflict with the policy fixed from time to time by the Standard Oil trustees, and that the net earnings of the Waters-Pierce Oil Company, since said trust agreement, are declared and paid out as dividends upon the capital stock, and the Standard Oil trustees have received their proportion of such dividends. The State further alleged that there were a large number of other corporations and companies in the United States in which stock was held in a similar way and with a similar effect, and from the accumulated dividends received by the Standard Oil trustees, dividends were declared and paid out by said trustees to the holders of Standard Oil certifictes, and not from the earnings of any special company; that in pursuance of a policy fixed by the trust agreement, defendant had occupied and still occupies and carries on its business exclusively in a sub-division of the territory of the United States designated as afore-

said, to-wit, Southwesern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory and a part of Louisiana, and does not invade or transact any of its business in any portion of the territory allotted to other members and parties in said trust agreement, or compete with them in any manner; and that none of the other members or parties to the trust agreement do business in Texas in competition with the Waters-Pierce Oil Company, and that by reason thereof there was no competition in the sale of oils or other products of petroleum in Texas between the Waters-Pierce Oil Company and any member of said trust whereby the Waters-Pierce Oil Company had monopolized and still monopolizes and controls the trade in petroleum and its products in Texas.

6. That since the 6th day of July, 1889, the defendant, the Waters-Pierce Oil Company, had been engaged in selling oils and products of petroleum in Texas, and through its agents and officers in Texas had been making contracts and agreements with various merchants and other dealers by the terms of which agreements and in consideration that the Waters-Pierce Oil Company would pay the dealers a small rebate on the oil purchased, they, the said merchants and dealers, had contracted with the Waters-Pierce Oil Company that they would not buy any oils from any other person or corporation, but would deal exclusively with defendant company, which contracts and agreements were sometimes verbal and sometimes in writing; and said amended petition set forth the names of various merchants and dealers residing in different parts of the state who had entered into such agreement. The State further alleged that the Waters-Pierce Oil Company since the 6th day of July, 1889, had made other contracts with retailers and dealers in petroleum in the State of Texas, by the terms of which the said merchants and dealers had contracted and agreed with said company to buy their oils exclusively from said company and in some instances further agreed not to sell the oils so bought to

any one dealing with any other person or corporation, setting forth the names and residences of such merchants and dealers. The State further alleged that since said July 6th, 1889, the Waters-Pierce Oil Company had made other contracts and agreements through its agents with various merchants and other dealers, whereby such merchants and dealers had contracted and agreed with the defendant company to sell said oils to its customers at prices fixed and established by said company, or its agents and officers, setting forth the names and residences of three merchants with whom said contracts were made.

7. The State further averred that prior to July 6th, 1889, to-wit, about the year 1881, the defendant company entered into a contract in writing with certain jobbers and wholesale merchants at Brownsville, Texas, and afterwards with other merchants in Brownsville, under the terms of which contract said merchants obligated themselves to purchase all their oils from defendant company at prices established by it and its agents, from which prices they, said merchants, were to receive a rebate of 15 cents per box on making settlements at the end of each month, which rebates were confined exclusively to those who were parties to the contract, and said oils were to be sold by said dealers at invoice price fixed by defendant company, which portion of said petition sets forth the names of said merchants and dealers at Brownsville under the provisions of said contract.

8. As a further ground of forfeiture, the State alleged that the defendant company had purchased the stock, good will, etc., in Texas, of the Eagle Refining Company, a corporation created under the laws of the State of Ohio, with its principal office in the city of Cleveland, and thereafter had conducted the business at Dallas, Texas, under the name of the Eagle Refining Company; that said purchase was in violation of the statute, in that the two corporations were engaged in the same line of business and that said purchase affected the production of petroleum

and its sale in Texas. It also alleged, as a further ground of forfeiture that a contract had been entered into between defendant company and one C. W. Robinson, of Houston, Texas, said Robinson being at the time an independent dealer in oil and petroleum products, under the terms of which the defendant company secured the control and management of the business of Robinson and employed him as agent,, which was alleged to be in violation of the anti-trust laws hereinbefore set out, and further cause of forfeiture.

9. The State further averred that the Waters-Pierce Oil Company since the date of its permit in 1889, had been guilty of gross abuses and misuses of its charter privileges and franchises in the state, for that in order to monopolize and control the trade in oil in Texas, the Waters-Pierce Oil Company, through its agents and officers, entered into the contracts set forth and were still engaged in making and carrying out similar contracts with other merchants and dealers in Texas, and that said company boycotted all dealers who refused to buy oils from it, refused to sell them oils and in case of competition in any locality, the Waters-Pierce Oil Company immediately cut the price of its oils below the reasonable and fair market price of the same, and by a system of threats and intimidation and bribery, prevented dealers in the state from buying or selling competitive oil, and had pursued, and was pursuing this course in the State of Texas, by reason of which contracts, agreements, combinations and trusts, together with the gross abuse and misuse of its corporate powers and privileges, said Waters-Pierce Oil Company had forfeited its right and permit to do business in Texas, and that said contracts and conspiracies on the part of the Waters-Pierce Oil Company constituted frauds upon the state in violation and contravention of its laws, were in restraint of trade, destructive of competition, and created a monopoly in Texas, thereby constituting grevious burdens upon the people of said state and were against public policy.

10. Upon these allegations the prayer of the State was for a writ of injunction restraining and prohibiting the Waters-Pierce Oil Company, its managers, officers, agents and representatives from carrying out the alleged agreements, combinations and trusts, from doing the unlawful acts and things mentioned, and from the misuse and abuse of its corporate powers and privileges; with further prayer that upon final hearing, temporary injunction should be perpetuated, and decree and judgment rendered canceling the permit of the Waters-Pierce Oil Company to do business in Texas and prohibiting it from doing any business in said State, either by itself or through its officers, managers, agents or representatives. (For petition see Record, pp. 1-23).

DEFENDANT'S ANSWER.

The amended answer of defendant, in reply to the amended petition of plaintiff, filed June 2, 1897, pleaded as follows: First, a general demurrer, followed by specifications of demurrer, setting up that the acts of March 30, 1889, and of April 30, 1895, were null and void and inoperative because they and their provisions were violative of the constitution of the United States.

Because said statutes discriminated between different classes of persons and citizens of the State of Texas and of the Unied States, and denied to certain persons and citizens the equal protection of the laws, it appearing upon the faces of said statutes that they authorized the punishment of certain citizens and classes of citizens for acts and omissions expressly authorized to be done and transacted by other classes and citizens; that said acts were in further conflict with the Constitution of the United States, because while pretending to embrace within their purview all classes and conditions of citizens in order to prevent combinations in trade, by their express exemption of citizens engaged in the business of live stock and agricul-

tural products in the hands of the producer or raiser and in giving exemptions to organizations of laborers for the purpose of maintaining standards of wages, the said statutes were limited in their application to a comparatively small portion of the citizenship who were thereby subjected to pains and penalties not inflicted upon the great majority of the people under similar circumstances and conditions, and that such legislation was class legislation.

And further, because said acts attempted to reach out and affect persons resident beyond the territorial limits of the State of Texas, and who are not and never have been personally present in the state, nor done any act within the state which would subject them to penalties.

And further, because said acts attempted to control, regulate and supervise dealings of inter-state commerce, and the allegations of plaintiff's petition showed upon their face that the Waters-Pierce Oil Company was engaged in inter-state commerce.

And further, because the act of March 30, 1889, did not prohibit a trust or declare it illegal, nor did it declare it an offense or propose to punish it, but merely defined a trust without denouncing it, and was therefore not a law, and no suit or prosecution could be maintained under it; and the allegations of plaintiff's amended petition show that most of the transactions complained of, occurred long prior to the passage of the act of April 30, 1895.

The defendant further demurred, specially claiming that said statutes were in contravention of the constitution of the United States in so far as they attempted to restrict the rights of certain classes of citizens to carry on their business enterprises in a customary and lawful manner and to fix and limit the prices of merchandise dealt in and offered for sale by them and to make such contracts and agreements with merchants and others dealing in similar commodities for the payment to the latter of rebates on commodities sold to them or to make other contracts such as were specified in plaintiff's petition.

The defendant further set up varions causes of demurrer to the amended petition of plaintiff, relating to defects of allegation and otherwise, which, in view of the settled decision of this court, need not be recapitulated.

The defendant further answered, pleading the general issue and specially various defenses which are unimportant upon the hearing of this writ of error (for answer, R. pp. 24-41).

Upon the trial, the defendant company asked various charges, among which was charge No. 1 refused by the court, to the effect that said acts of March 30, 1889, and April 30, 1895, known as the anti-trust acts, were contrary to the Constitution of the United States, and were therefore null and void, and that the jury would return their verdict in favor of the defendant. This special instruction was refused by the court (R. p. 52). Among other instructions requested was special instruction No. 7 by defendant, to the effect that under the pleadings and the evidence the jury must find a verdict for defendant. This was also refused (R. p. 55). The court instructed the jury, among other things, to return a verdict for the defendants Hathaway, Austin, Grice, Keenan and Fries, as they were only the agents of defendant company and were not liable in the suit (R. p. 9). The court also eliminated the alleged transactions between the defendant company and the Eagle Refining Company, and with C. W. Robinson and some others in the State of Texas, instructing the jury that such transactions were not believed to be in violation of the law (R. p. 48). The court further withdrew from the jury its charge, any consideration of an alleged combination between the Standard Oil Trust and the Waters-Pierce Oil Company, because the evidence was not sufficient to show that the Waters-Pierce Oil Company ever became a member of said trust in a manner that violated the laws of the State of Texas (R. p. 48).

Judgment was rendered on June 15th, 1897, upon a verdict of the jury in favor of the State, by which judgment

it was decreed that the Waters-Pierce Oil Company be and was thereby denied the right and prohibited from doing any business within the State of Texas and that its permit to do business within said state theretofore issued, be and the same was thereby cancelled and held for naught, and that the Waters-Pierce Oil Company, its managers, superintendents, agents, servants and attorneys were perpetually enjoined and restrained from doing business within the State of Texas. But the judgment contained this further recital, "Nothing herein shall be construed to in any way effect, or apply to, or prohibit said defendant's right to engage in inter-state commerce within this state" (R. pp. 41-42). Judgment was entered by direction of the court also in favor of E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan and Louis Fries against the State, they being merely agents of the defendant company.

All the demurrers of defendant were also overruled by the judgment, to which the defendant excepted and took a bill (See bill of exception No. 1, R. p. 56). The defendant also took a bill of exceptions to the charge of the court on various grounds, and also to the refusal of the special instructions requested by defendant (Bill of exceptions No. 2, R. p. 56-62). Thereafter in terms of law, defendant filed its motion in arrest of judgment, basing such motion among other things upon section 4 of the acts of March 30, 1889, and of April 30, 1895, on the ground of the unconstitutionality of said provision, which is as follows:

"Section 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceeding in the District Court of Travis County, in the name of the State of Texas." (R. pp. 63-64).

Said motion, as well as motion for new trial, was overruled, to which defendant took a bill (R. p. 63). Appeal

was prosecuted in due form to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, having jurisdiction of causes on appeal from Travis County, and on March 9th, 1898, said Court of Civil Appeals handed down its judgment, affirming in all things the judgment of the court below (R. p. 180). Said court also delivered its elaborate opinion on the same day, which is incorporated in the record (R. pp. 161-180).

Thereafter on March 18, 1898, within the time prescribed by law, the plaintiff in error, the Waters-Pierce Oil Company, filed in said Court of Civil Appeals its motion for rehearing, setting up again in said motion the unconstitutionality of said acts of 1889 and 1895, substantially as set up in said demurrers in the trial court (R. pp. 180-195). This motion was overruled by the said Court of Civil Appeals on March 30th, 1898, (R. p. 195). Thereafter on, to-wit, April 22, 1898, in accordance with the practice pertaining in the state courts of Texas, the Waters-Pierce Oil Company filed its petition for a writ of error to the Supreme Court of the State of Texas, again setting up and urging the unconstitutionality of the acts of 1889 and 1895, substantially as set forth in its demurrers and in its assignments of error in the Court of Civil Appeals. This petition for writ of error is in the record (R. pp. 196-206). On May 5, 1898, the Supreme Court of Texas refused the writ of error applied for (R. p. 207). Thereafter on May 17th, 1898, the Waters-Pierce Oil Company filed its motion for rehearing in said Supreme Court, again urging the unconstitutionality of said acts, which motion for rehearing was overruled (R. pp. 208-211); and thereupon on the 4th day of June, 1898, the Waters-Pierce Oil Company sued out its writ of error to this Court, and assigned the following

SPECIFICATIONS OF ERROR.

I.

The Court of Civil Appeals of the State of Texas erred in holding with the trial court that the statutes of the State of Texas of 1889 and of 1895, commonly known as the anti-trust acts, were not violative of the Constitution of the United States, because said acts expressly discriminate in their operation and effect between persons and classes, and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, merchants, and professional men for acts which they expressly authorize farmers and stock raisers to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and experessly violative of the fourteenth amendment to the Constitution of the United States.

II.

The court erred further in holding that said acts did not violate the Constitution of the United States, because said acts did not exempt, except indirectly, certain classes of citizenship from their operation, but they exempted certain classes of property, the annual earnings of the farmer and stock raiser, from denunciation while such earnings remain in the hands of the original producer and raiser, and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock raisers under a certain state of circumstances, from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock raisers are not treated alike, even with reference to their annual earnings. There is, therefore, an absence of that classification upon which the state courts repose for the justification of their rulings.

III.

The court further erred in holding said statutes not violative of the Constitution of the United States, because they

in their natural operation and effect deprive many citizens and persons of their property without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and by mere statutory enactment, without due condemnation, according to the law of the land.

IV.

The court further erred in holding that said statutes were not violative of the Constitution of the United States because said statutes (Section 4) assume the power of the state to deny to every foreign corporation the right to do *any* business in Texas, inter-state or otherwise, and it was not competent for the trial court or the Court of Civil Appeals of the State of Texas, by judicial limitation, as was attempted and had in this case, to restrict the operation of said sections to local business alone, as said sections in each act must be construed as an entirety, and are not separable by judicial construction so as to eliminate a manifest unconstitutionality as to the jurisdiction of the state and her courts, and to validate by judicial construction portions of the section as applicable solely to local business.

V.

The court further erred in holding said statutes not to be violative of the Constitution of the United States, because said statutes usurp and were intended to usurp the authority and jurisdiction of the United States and the other states in the matter of prosecution for acts occurring beyond the territorial limits of the State of Texas.

VI.

The court further erred in holding with the trial court that the case at bar was a controversy of a civil nature and in approving the ruling of the court below in refusing to

instruct the jury, upon request by plaintiff in error, that if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature.

BRIEF OF THE ARGUMENT.

I.

The statutes of the State of Texas of March 30, 1889, and of April 30, 1895, commonly known as the anti-trust acts, are violative of the Constitution of the United States, because said acts expressly discriminate in their operation, and effect between persons and classes of persons the equal protection of the law; they prescribe penalties of felony against artisans, mechanics, merchants, professional men and all other classes except farmers and stock raisers for acts which they expressly authorize the last two classes to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose and expressly violative of the Fourteenth Amendment to the Constitution of the United States.

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283.
G., C. & S. F. Co v. Ellis, 165 U. S., 150.
Duncan v. Missouri, 152 U. S., 382.
Yick Wo v. Hopkins, 118 U. S., 356.
Barbier v. Connally, 113 U. S., 27.
Harding v. People, 160 Ill., 459.
Millett v. People, 117 Ill., 294.
Ex- P. Jentizech (Cal.), 32 L. R. A., 664.
State v. Goodwill, (W. Va.), 6 L. R. A., 621.
Frorer v. People (Ill.), 16 L. R. A., 492.
In re. Garrabad (Wis.), 19 L. R. A., 858.
State v. Loomis, 115 Mo., 307.

State v. Inlow, 128 Mo., 163.
State v. Walsh (Mo. Sup. Ct.), 37 S. W. Rep., 1112.
People v. Marx, 99 N. Y., 377.
Wally v. Kennedy, 2 Yerg., 555.
Van Zant v. Waddell, 2 Yerg., 270-1.
Janes v. Reynolds, 2 Tex., 252.
Ry v. Wilson (Tex.), 19 S. W. Rep., 913.
Cooley on Cons. Lim., p. 355.
Dent v. W. Va., 129 U. S., 114.
San Mateo v. So. Pacific Ry Co., 13 Fed. Rep., 733.

The acts in question are set forth at length in the preceding pages of this brief, and the point intended to be presented herein arises principally upon section 13 of the act of 1889, and the proviso to section 12 of the act of 1895. The latter act is really intended as a substitute for the prior act of 1889, though both acts were construed by the courts below as being in force at the date of trial. These statutes denounce as felonies any combinations of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any or all of certain enumerated purposes, such as creating or carrying out restrictions of trade, limiting or reducing the production or to increase or reduce the price of merchandise or commodities, preventing competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or fixing at a standard or figure whereby its price to the public should be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in the state, or entering into, making, executing or carrying out any contract, obligation or agreement of any kind or description by which the parties bind themselves not to sell or dispose of or transport any article or commodity or article of trade, use, merchandise, commerce or consumption below a standard figure, or by which they shall agree in any manner to keep the price

of any article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner settle the price of any article or commodity or transportation between themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any article or commodity, or by which they shall agree to pool, combine or unite any interests they may have in connection with the sale or transportation of any such article or commodity so that its price might in any manner be affected. And after providing unusual and startling provisions for the enforcement of said statutes, and denouncing the penalties against each and every person without discrimination who violated the provisions of the statutes, the Legislature of Texas in the act of 1889, inserted this provision:

"Section 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

And in the act of 1895 the Legislature of Texas inserted the following provision:

"Section 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state: *Provided*, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages."

It will be observed that said acts do not exempt directly, certain classes of citizenship in their operation, but they exempt certain classes of property, the annual earnings of the farmer and stock raiser from denunciation, while such earnings remain in the hands of the original producer and raiser;. and they also exempt laborers who may combine for the purpose of raising their wages. The natural effect of these laws, however, is to practically exempt substantially all the farmers and stock raisers of Texas from

the pains and penalties denounced by the statutes against all other classes, and to permit the farmers and stock raisers to perform and transact their business with all possible latitude for the protection of their interests while denying to all other classes of citizenship equal privileges.

This court has frequently held in effect that no matter in what language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Collins v. Hampshire, 18 Sup. Ct. Rep., 768.
Morgans L. & T. R. v. La. &c., 118 U. S., 445.
Henderson v. The Mayor &c., 92 U. S., 259.

Looking then to these statutes, the purpose of the exemption is obvious. It unmistakably appears that such purpose was to give special privileges to the farmers and stock raisers, as well as laborers, and to deny equal and similar privileges to all other classes, notwithstanding the verbiage of the respective acts. Indeed, this purpose is not attempted to be concealed; and it is so manifest that the statutes may be very well treated as a plain open declaration on the part of the Legislature of Texas, that from some cause, satisfactory to them, farmers and stock raisers in Texas were entitled to superior privileges over all other citizens and classes of citizens, either in the State of Texas or outside of the state, and citizens of other states of the American Union. We may, therefore, for the present at least, discuss these acts as if the Legislature in their enactment had expressly exempted the classes indicated by the operation of the acts.

This legislation is at least unusual, if not startling. The statute books of no state or country, with which we are familiar, contain anything analogous to some features of this legislation now before the court. Usually, if any act is denounced by legislation as an infamous crime, it applies to all classes of the community indiscriminately. Murder, rape, larceny, robbery, arson, and all other similar infamous offenses are denounced by the laws of every civ-

ilized people without exemption of any classes in their operation, and without authorization on the part of the law-making power to any class or individual guaranteeing him immunity in case of his commission of the act so denounced. Yet in these Texas statutes the law-making power has seen fit to denounce every species of combination or understanding relating to trade, commerce or transportation, the bargain, sale or exchange of any and every commodity in combination, but has taken pains to exempt from the operation of said act and from the penalties denounced practically all the farmers and stock raisers in the State of Texas.

The plea is asserted, in an attempted vindication of this class of legislation that it was not necessary to include the farmers and stock raisers, because experience had demonstrated that they were unable to combine anyway, and that, therefore, no harm was done or could be done any other classes by not including them in the denunciation. We need hardly say to an intelligent court that such argument is altogether without merit. Many persons, by reason of physical disability, or by moral and Christian training and education, are incapable of committing certain crimes; yet no Legislature has ever ventured to exempt such classes from the operations of a general law denouncing as felonies the acts embraced in such crime. It was reserved for the Texas Legislature alone to inaugurate this startling innovation in the legislation of the country; and it is needless to add that the exemptions rendered the legislation purely arbitrary and its provisions as causing discrimination and creating inequalities.

It is true that in the latest expressions of this court (Magoun vs. Illinois Trust and Savings Bank) this court has held that the rule laid down by the Fourteenth Amendment prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude so far as interference by this court is concerned; and that the rule only prescribes that the legislation shall have the

attribute of equality of operation, which equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In other words, that the state may distinguish, elect and classify objects of legislation, and necessarily this power must have a wide range of discretion. But the court in its opinion adds that this rule is not without limitation, and that clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional provision. This court had already decided in G., C. & S. F. Ry Co. vs. Ellis, 165 U. S., that a mere classification was not sufficient to relieve the statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must not appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

We apprehend that the converse of the latter proposition is equally true, and that a discrimination may be equally as potent when directed in favor of one or two particular classes in the community to the disparagement and detriment of other classes as if the discrimination was against any select or particular class; and in the event such discrimination is apparent by reason of favoritism to one or two classes, it would be equally obnoxious to the provisions of the Fourteenth Amendment. The discrimination in this case consists of the latter class. It is a discrimination in favor of three favored classes of a community, constituting, as these classes do, at least 80 per cent of the voting and manhood population of the state. Courts take notice judicially of the census. (Kalbrier vs. Leonard, 34 Ind., 497; Stults vs. State, 65 Ind., 492; People vs. Williams, 64 Cal., 87; Worcester Bank vs Cheney, 94 Ill., 430.) The census figures, as appears from the record in this case (R. p. 146) show that there

are 434,091 male farmers, planters, overseers, agricultural laborers, stock raisers, etc., in Texas, and the voting population of the state is about 540,000 according to the census of 1890. So it appears that the Legislature of Texas, after denouncing certain acts as infamous crimes, and providing for their punishment, proceed to exempt from the operation of the acts about 80 per cent of the male population of the state, leaving the pains and penalties denounced by the act to be restricted to about 20 per cent of the male population of the state. Is this a reasonable classification, if it be a classification? Is it one based upon some difference which bears a just and proper relation to the attempted classification? Rather, is it not a mere arbitrary selection, and can it be made anything else? This seems to be the test, as laid down by the latest expositions of this court; and we submit that upon the doctrine of classification on which the State of Texas depends for a favorable adjudication upon the constitutionality of these laws, the enactments must be condemned as utterly unreasonable and purely arbitrary. Why should the farmer and stock raiser be entitled to special privileges in the conduct of their business, and the same privileges be denied to the shoemaker and the mechanic? Why should the laborer be allowed to combine for the purpose of promoting his wages, while the professional man is made a felon if he attempts to exercise the same privilege?

The agricultural products of the farmer constitute the annual increment or income resulting from his labor, and may be classed as his annual revenue. The same may be said with reference to the annual production of the stock raiser. Why should these classes be permitted to combine with the world in any manner they deem fit for the purpose of raising the prices of their products, while the cabinetmaker, carpenter and shoemaker are denied the right of combination for similar purposes with reference to the products of their skill and capital? If any reasonable ground exists for such legislative discrimination, it has never occurred to counsel for plaintiff in error, nor has

it ever been furnished, after a protracted and tedious litigation, by counsel for defendant in error. It has been sometimes urged that the whole community was interested in the prosperity of the farmer and stock raiser, in that the prosperity of all other classes in an agricultural community, like Texas, rests alone upon the prosperity of these two classes. While this is not altogether true, it is a sufficient answer to say that the necessaries of life to all classes must come from agricultural products and live stock at one time in the hands of the original producer or raiser. The bread and meat we consume and the clothing we wear are dependent for supply upon this source. Can it be to the interest of a community that these necessaries of life, by combination, should be promoted in price so as to make them inaccessible to the masses of a community who are unable to buy them? This question can have but one answer from a reasonable standpoint. The public in every community is interested in the cheapening of the necessaries and comforts of life, so as to bring them within the reach, as far as possible, of all classes. Agricultural products, by reasonable construction of legislative intention, must include market products, such as vegetables, meat, milk, butter and eggs, which are found daily upon the tables of all classes. Is it to the interest of a community or of a state that these table necessities should command a high price caused by trusts and combinations organized for the purchase and sale of such products? Or is it to the interest of the community and state that such products should find their market on a level with all other productions in the community and be regulated solely by supply and demand? And, going a step further, and replying to the argument that doubtless will be urged before the court, that there could be effected no combination in agricultural products and live stock, does not the history of each community in the United States refute the position, and has it not occurred in almost every community in the United States that these combinations have been effected with reference to the products of market gardens and country produce, not only

as between dealers, but as between producers? We therefore submit the proposition contained in the first error assigned by plaintiff in error, with perfect confidence that this court must hold that the enactments in question do discriminate between citizens and do deny to certain citizens and classes of citizens the equal protection of the laws.

II.

It is assumed, and we have hitherto discussed the question upon that basis, that defendant in error will contend that the acts in question do provide for a classification, and that such classification relieves *ipso facto* the enactments from constitutional question. Prior to the decision of the Ellis case by this court, the Supreme Court of Texas held in effect that the provisions of these statutes constituted a classification which was within the legislative power, and that therefore they were not obnoxious to the Fourteenth Amendment. (Anheuser-Busch Co. v. Houck, 30 S. W. Rep., 869; Anheuser-Busch Co. v. Houck, 27 S. W. Rep., 696; Texas Brewing Co. v. Templeman, 38 S. W. Rep., 27; Fuqua v. Brewing Co., 38 S. W. Rep., 29). Indeed the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in the case now before the court, reiterates the doctrine, notwithstanding the decision in the Ellis case, and practically holds that in the matter of classification, state authority is unbridled (R. pp. 167-169). In the Ellis case (165 U. S., 150) this court has held that while as a general proposition it is undeniably true that if a state enactment dealt alike to all of a certain class, it was not obnoxious to the charge of a denial of equal protection, yet it was equally true that such classification could not be made arbitrarily, and that arbitrary selection could never be justified by calling it classification; and the court in its opinion, added, that no duty rested more imperatively upon the court than the enforcement of those constitutional provisions intended to secure that equality of right which is the foundation of every free government. Looking, therefore, further at the acts, the question arises most

pertinently, "are all persons brought under the influence treated alike under the same conditions?" Does not the suggestion immediately arise that particular classes of agriculturists and stock raisers are favored, while others of the same class are discriminated against? Does it not appear from the face of the enactment that agriculturists and stock raisers who confine their dealings exclusively to their own products, are allowed to combine between themselves or with others for the purpose of enhancing the market values of the fruits of their labor, while other agriculturists and stock raisers coming clearly within the same classes, are denied this privilege? Many of the agriculturists of Texas are tenants, and it is frequently the case that the land owner, who is himself a farmer, rents his lands for money rents, that is, for a certain sum per acre in cash, to be paid by the tenant at or toward the conclusion of the agricultural season. Who is the original producer in that case, the farmer or the tenant? Evidently the tenant, and the farmer is debarred the classification of an original producer, and must come within the penalties of the law. Or, carrying the example further, the farmer owns his lands, he hires his laborers and at the end of the agricultural season, and by mutual agreement, he pays them for their labor in the products of the soil instead of cash. Who is the original producer in that instance? Evidently not the laborer, but the land owner, and though the farmer may have sweated over the product for a year, yet not being the original producer or raiser, but a mere hireling, if he receives his pay in the products of the soil, and then in order to enhance their price or market value, makes any sort of combination, he becomes a criminal. Similar examples can easily be adduced with reference to the ranch owner and his labor, and other illustrations might be multiplied indefinitely as applicable to various avocations in life; but such illustrations are hardly necessary with this court, as they occur readily to the mind of the professional reader immediately upon an inspection of these two statutes. As a fact, therefore, it may be assumed that the legislation

in question does not apply to particular bodies or associations, nor to particular classes, and all persons brought under their influence are not treated alike under the same conditions and circumstances. These statutes constitute a legislative attempt to favor certain classes *of property*, constituting the annual earnings of some portions of two certain classes, and to discriminate in the most invidious manner against the earnings of all other classes. To assert that such legislation does not contravene the Fourteenth Amendment to the Constitution of the United States, is to say that the underlying principles in our government must be ignored, set aside, and defied at the arbitrary caprice of any state legislature. This principle of equality before the law was not established by the Fourteenth Amendment, but was simply recognized and emphasized thereby. That all men were created free and equal was announced in America in 1776, and it has always been a doctrine firmly adhered to by our English ancestors Mr. Justice Catron, of this court, and long before he honored this bench, laid down an exposition of this doctrine many years anterior to the Fourteenth Amendment, in words that should be engraven on the minds of every patriotic law-maker. (See Wally v. Kennedy, 2 Yerg., 555; Van Zant v. Waddell, 2 Yerg., 270-271). This court has said in Barbier v. Connally (113 U. S., 27):

"These provisions are undoubtedly intended that there should be no arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for hte protection of their persons and property, and prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid

upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as prescribed to all for like offenses."

All property in the state is entitled to equal protection. The earnings of the mechanic, and of the professional man should receive the same favor and protection as the earnings of the farmer or the stock raiser; and discrimination may be as potent against the citizen in the direction of his property as if aimed directly against himself personally. The right to hold, enjoy and dispose of property upon equal terms with his neighbor and to make all necessary agreements and contracts with reference to it, which may be believed by the owner to be for his betterment equally with such right enjoyed by his neighbor, constitute the most essential principles of American liberty. With some citizens these rights are taken away by these statutes; with others they are promoted.

III.

The statutes in question are further violative of the Constitution of the United States because they in their natural operation and effect deprive many citizens and persons of their property, without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens; and they take from many persons and citizens their rights of property by mere statutory enactment without due condemnation, according to the law of the land.

Slaughter house cases, 16 Wall., 30.
Bertholf v. O'Reilly, 74 N. Y., 515.
People v. Marx, 99 N. Y., 377.
People v. Gillson, 109 N. Y., 389.
R'y Co. v. Jacksonville, 67 Ill., 37.
Hey Sing Eich v. Anderson, 57 Cal., 251.

Lakeview v. Cemetery Co., 70 Ill., 192.
Match Co. v. Roeber, 106 N. Y., 473.
Chemical Co. v. Chemical Co., 64 Fed. R., 946.
Tiedeman Police Power, pp. 223 and 224.

The special vices of the two acts under this assignment are as follows:

Section 11 of the act of 1889 reads as follows.

"That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity."

The act of 1895, section 11, contains the same provision.

One of the most sacred rights of liberty is the right of contract, and all rights of contract which are necessary for the carrying on of business affairs, are protected by the Constitution, and are incapable of restraint by legislative action. This right of contract embraces the formation of business relations between citizens, and any citizen may form business relations with whom he pleases, and in the conduct of such business they have an inalienable right to fix and limit the character and amount of business they propose to transact, to select parties with whom they propose to deal, and to fix the prices at which they intend to buy or sell. As said by Tiedeman in his work on limitations of the police power:

"It is part of the national and civil liberty to form business relations free from the dictation of the state; that a like freedom should be secured and enjoyed in determining the conditions and terms of the contracts which constitute the base of the business relation or transaction. It is, therefore, the general rule that a man is free to ask for his wares, or his services, whatever price he is able to get, and others are willing to pay." (p. 233).

"A man has a constitutional right to buy anything in any quantity, provided he uses only fair means, and sets his own price on it, or refuses to sell it at all. And what one man may lawfully do, as an individual, two or more may

also do when combined as partners. Combinations for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims with which they are formed. It is, therefore, impossible to prohibit all combination. The prohibition must rest upon the objectionable character of the object of the combination. If there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

The constitutional privileges which protect the citizen in his liberty and property, entitle him to raise, produce, or manufacture; to increase or reduce the amount of his products; to fix and limit the prices at which he will buy and sell; to bargain with others as to prices; and to enter into all contracts usual and necessary in the ordinary avocations of production and trade. Government cannot limit these natural privileges, and any law which undertakes to abolish these rights, the exercise of which does not involve infringement upon the rights of others, or to limit their exercise in legitimate callings, is not within the police power. The Legislature cannot under pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning the health, safety, or welfare of society, and the courts may examine into and annul such legislation. (67 Ill., 37; 57 Cal., 251). If the prosecution of a particular calling or occupation threatens damage to the public or to individuals; it is a legitimate subject for public regulation, to the extent of preventing the evil; but it is strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulation. (70 Ill., 192). It is likewise a judicial question whether the particular

police regulation extends beyond the threatened evil, and prohibits that which involves no threatened danger to the public. The state certainly has the power to prescribe regulations deemed promotive of the health, peace, morals education and good order of its people, and to so legislate as to increase industries, develop resources, and add to the general wealth and prosperity Sometimes legislation of this character, having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary to be imposed for general benefits, such as supplying water, preventing fires, lighting districts, cleaning and grading streets, opening parks, and many other like objects. Occasious for these purposes may press with more or less weight upon one than upon another, but their design is not to impose unequal and unneccessary restriction upon any one, but to promote the general good with as little inconvenience as possible. Though in many repects, special and discriminative in their character, under proper limitations, they do not furnish just ground of complaint, if they operate alike upon all persons and property under similar circumstances and conditions. The state, in the exercise of its police power, may sometimes exempt certain classes from the operation of a general law, but the case at bar furnishes the only instance within the knowledge of counsel for appellee, in which the state has attempted to confirm, by general law, certain privileges to favored avocations, and has denied the other classes a right to exercise such privileges. It is the first recorded instance of legislation, in which the state has said to two or three classes: "Go, combine with the world if you desire, raise prices by such combination to any figure; the higher the better; rob the customer ad libitum in the absolute necessities of human existence, and the greater the robbery, the better for the people. I will be a guide and a shield to you by day and by night;" and in the same breath, the state has decreed that if any one, outside of confew favored classes, shall dare exercise their rights of contract with reference to property, which adheres to them

as a part and parcel of their natural liberty, just as it does with the select classes, they shall be anathema.

These legislative acts are not addressed to the suppression of unreasonable and oppresive combination, but to any kind, reasonable or unreasonable; and such is their interpretation by the Supreme Court of Texas. They embrace combinations between two or more persons, and hence include common partnerships. They denounce alike combinations between small capital and a minimum ot skill, equally with large capital and a maximum of skill. It is made criminal for any two persons to combine as partners, corporations or otherwise, in ordinary business, to increas or reduce the price of their commodities; to fix a standard of prices: to limit or reduce the production of commodities; to limit competition between them; to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between themselves, or between themselves and others; and to create and carry out any restrictions in trade. If marriage may be considered a business venture, as it undoubtedly is by gradual development, then is matrimony made criminal by these acts, for it certainly prevents competition between the contracting parties, even if it does not limit production. One of its objects is to reduce or increase prices and to fix standards. A and B agree to combine their capital, skill and acts in an ordinary business co-partnership for the purpose of manufacturing and dealing in certain articles. They must necessarily determine in advance the extent of production, and the prices at which they propose to sell, and thus fix a standard of prices, below which they agree not to sell. This is a crime under this act. They fix a figure on which they commence sales, and agree to graduate prices according to the cost of production. This is likewise a crime. In the vicissitude of trade, they are compelled to lower prices in order to meet competition. This is also a crime. The cost of production may advance, to meet which, they agree to advance

prices. This is a felony. Stock accumulates and trade languishes, and in order to do any business they agree to reduce prices. Again they are denounced as felons by these acts. And yet, the right to combine, to form partnerships and joint stock associations, and to agree as to production and prices, is not oppressive to the public nor unjust to the individual, nor contrary to public policy. It is an essential right, as part of the liberty of the citizen, of which no Legislature can deprive him; and that an ordinary business co-partnership is rendered criminal by this act, is apparent from the concluding portion of section 1, which forbids any two or more persons from combining together their capital, skill or acts, for the purpose of keeping any commodity at a fixed or graded figure, or by which they shall agree to unite any interest they may have in the sale or transportation of any article or commodity, so that its price might in any manner be effected. (Secs. 1 and 5). The same inhibition applies to members of a corporation, for such membership certainly excludes all idea of competition between individuals composing the body corporate; and yet the laws of Texas authorize the formation of corporations for numerous business purposes. Can it be that the same statute book contains a law imposing the penalty of felony upon all individuals who may enter into such associations? Corporations constitute the basis of our present economic civilization, and so permeate and control the business world, as to make their present existence an absolute necessity to mankind. Any interference with their natural operations, by way of prohibition, infringes at once upon the liberty of the citizens, who, under legal sanction, have a right to deal with and through such agencies, and by lawful methods have made them the chief hand-maiden of an ever advancing and developing cicilization. If they do wrong, they ought to be punished, but Texas ought not, at least, by a single enactment, to abolish them from the face of the earth. Restrictions in trade are not always hurtful, and competition is not always a public benefaction. Excessive competition almost in-

variably results in actual injury to the public. The right to combine for ordinary business purposes, and as a consequence, to fix prices and charge them according to varying conditions, and to limit or increase production according to business exegencies, constitute in great part. the liberty of the citizen, and legislation treads upon dangerous ground when it attempts to limit or abridge the right of private contract. Such legislation, to be valid, must always carry with it the essential sanction of reasonableness, and if it oversteps this established boundary, it comes in immediate conflict with the liberty of the citizen, and sooner or later disappears from the statute book as an utterly worthless thing. These Texas acts reach the acme of absurdity by making penal any agreement for the purpose of reducing prices to the public; and all the regulations attempted are not only unreasonable in their scope and purpose, but utterly subversive of fundamental principles, and collide in their absolute recklessness with the Constitutions of both nation and state. They should be weighed in the balances and found wanting. The property rights of citizens, not only of Texas, but of other states, and of the United States, are involved in this issue. Many of them have made lawful and reasonable business contracts, upon the faith of which they have expended large sums of money, relying upon that protection in such ventures that the law always affords. To their surprise, the unreasonable provisions of this legislation have been applied to their ventures in trade, and their property has been taken from them, under section eleven of these acts, by a refusal of the courts to enforce their contracts. They have dealt with their property as they saw citizens of Texas dealing with their property, and naturally supposed that they were living under a government of equal laws. and that they could not be deprived of their property except by due course of the law of the land. They have discovered, however, that the arbitrary provisions of these statutes, and the unconstitutional regulations enacted, are applied to them, and that their contracts have been held "absolutely

void and not enforceable either in law or equity." The court is asked to right these wrongs and to again vindicate the liberty of the citizen from arbitrary spoilation, and to measure the same justice to an outsider that this ill-considered and unconstitutional enactment to the farmers and stock raisers of Texas.

IV.

Said statutes are violative of the Constitution of the United States, for the further reason that they assume the power of the state to deny to every foreign corporation the right to do any business in Texas, inter-state or otherwise; and the attempt of the trial court sanctioned, by a ruling of the appellate tribunal, by judicial limitation to restrict the operation of said statutes to local business alone, did not relieve the statutes of the vice of unconstitutionality, because such action was beyond judicial power.

U. S. v. Reese, U. S., 214, 221.
Trade Mark Cases, 100 U. S., 82.
U. S. v. Harris, 106 U. S., 629.
Baldwin v. Frank, 120 U. S., 678.
Postal Telegraph Co. v. Adams, 155 U. S., 696.
Allgeyer v. La., 165 U. S., 578.
Leisy v. Hardin, 135 U. S., 100.
Schollenberger v. Pa., 18 Sup. Ct. Rep., 757.

Section 4 of both the act of 1889 and of 1895 reads as follows:

"Section 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the District Court of Travis County in the name of the State of Texas."

This action was brought by the State of Texas by authority of and in conformity with the provisions of this

section. The prayer of the state in its petition was for a temporary injunction and that upon final hearing, the same be perpetuated and a decree and judgment rendered canceling the permit of the Waters-Pierce Oil Company to do business in Texas, and prohibiting it from doing *any* business in said state, either by itself or through its officers, managers, agents or representatives (R. p. 23). After the point was raised by plaintiff in error, in the trial below, that this particular provision of said statutes was violative of the Constitution of the United States, which point was raised upon argument and by motion in arrest of judgment (R. pp. 63-4), the court proceeded to render judgment upon the verdict wherein it was ordered, adjudged and decreed that the defendant, the Waters-Pierce Oil Company be, and was thereby denied the right and prohibited from doing any business within this state; but afterwards the judgment contained this provision:

"Nothing herein shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in inter-state commerce within this state." (R. pp. 41-42).

The point was saved by bill of exceptions No 3 (R. p. 63) and was presented by due assignment of error in the Court of Civil Appeals of the State of Texas (R. p. 150, section 18); and that court, in its opinion, held that the judgment contained no error as assigned, and that it was competent for the court to enter the judgment as set forth, and thereby limit the operation of the statutes so as to relieve them from any seeming unconstitutional feature (R. p. 77). This error of the courts below is again reassigned in this court (R. p. 24). The Court of Civil Appeals, in the delivery of its opinion, labored under the impression that except where the foreign corporation is in the employ of the federal government, or is engaged strictly in matters of inter-state commerce, they were not entitled to any rights or privileges except those which might be conferred upon them as an act of grace by the state. (R. p. 178). Notwithstanding this court has held

in the Postal Telegraph Co. v. Adams, sup., that a state could not exclude from its limits a corporation engaged in inter-state commerce, either directly in terms, or indirectly by the imposition of inadmissible conditions, a further inspection of the opinion of the Court of Civil Appeals will indicate that such court was under the impression that when a foreign corporation located itself in the state and sold its articles of commerce, even in unbroken packages, that it became a local dealer and amenable to sate authority.

However that may be, and it is not necessary to discuss the issues incidentally raised by said opinion, the provisions of section 4 of the two acts of 1889 and 1895 are manifestly violative of the Constitution of the United States; and the efforts of the Texas courts in their attempts to validate the provision by the elimination of such features as were manifestly unconstitutional, must prove abortive. This court has held that it does not lie with courts, by judicial construction, to limit the operation of a statute only to those matters which the state might rightfully prohibit and punish. The statutes must be taken as they are written and a court is not able to reject a part which is unconstitutional, and retain the remainder, because in the special instance at bar, it is not possible to separate that which is unconstitutional from that which is not. Language could not be more explicit than that employed in section 4 of these two acts. "Prohibited from doing any business within this state" certainly comprehends every character of business, inter-state as well as local. It cannot lie with the courts in the construction and administration of these statutes to eliminate any feature thereof by holding that the Legislature did not intend to say what they actually did say, and that it intended only to prohibit the offending foreign corporation from doing any local business in Texas, for such is not the language of the law-making power. The Legislature has said "any business", and it must be considered that they meant what they said. This being the case, the effort of the trial court,

by its judgment, to so qualify the statute as to relieve it of its unconstitutionality, must be imputed to a vain imagination.

In U. S. v. Reese (92 U. S., 214-221) which arose upon a proper construction of the third and fourth sections of the act of May 31st, 1870 (16 Stat., 140), this court held that as these sections were in general language broad enough to cover wrongful acts as well as within the constitutional jurisdiction of courts, they could not be limited by judicial construction so as to make them operate only on that which courts might rightfully prohibit and punish. In delivering the opinion of the court, Mr. Chief Justice Waite said:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully de detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative branch of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must annul its encroachments upon the reserve power of the states and the people."

In the Trade Mark Cases (100 U. S., 82-99) this court has held to a similar effect. This case arose upon the legislation of Congress in regard to trade marks, and because the statutes, sections 4 and 5 of the act of 1876, as well as section 4937 of the Revised Statutes, did not in their terms restrict the penalties prescribed within the limits of federal power, this court held that the acts in question were unconstitutional and void, because they embraced too much, the holding of the court being that such legislation, by its language, embraced and was intended to embrace all commerce, including that between citizens of the same state, as well as commerce with foreign nations and among the several states and with the Indian tribes, thereby presenting the same question now under discussion. Mr. Justice Miller, in delivering the opinion of the court condemning such legislation as extra-constitutional, and the inability of the courts to relieve the statutes by construction and interpretation of this unconstitutional feature, was equally emphatic in the language employed. The opinion says:

"It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases and no further. To this there are two objections. First, the indictments in these cases do not show that the trade marks which are wrongly used, were trade marks in that kind of commerce; secondly, while it may be true that when one part of the statute is valid and unconstitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in U. S. v. Reese (92 U. S., 214). In that case, Congress had passed a statute

punishing election officers who should refuse to any person lawfully entitled to do so, the right to cast his vote at any election. This court was of the opinion that as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude. It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial; but the court said, through the Chief Justice, "we are not able to reject a part which is unconstitutional and retain the remainder because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be obtained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question then to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. To limit this statute in the manner now asked for, will be to make a new law, not to enforce an old one. This is no part of our duty. If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before the body, it would be unwilling to do, viz: make a trade mark law which is only partial in its operation and which would complicate the rights which parties would hold, in some instances under the act of Congress and in others, under state laws."

In Baldwin v. Franks (120 U. S., 678), which case arose upon the conspiracy acts of Congress, the court, in holding certain sections of said act unconstitutional as beyond the power of Congress, and speaking through the Chief Justice, said:

"In support of this argument, reliance is had upon the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional, rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation so that each may be read by itself. This statute, considered as a statute punishing conspiracy in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. * * * It provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws or equal privileges or immunities under the laws. A single provision which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens. Those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought, must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.'

To the same effect see also U. S. v. Harris (106 U. S., 629). It occurs to counsel for plaintiff in error that these authorities are conclusive as to the constitutionality of section 4 of these two Texas statutes. As said before, this particular section has no parts within the meaning of the rule, and is, therefore, incapable of separation. They provide in general terms for the punishment of foreign corporations, which punishment consists in denying them the right to do any business in Texas. A single provision makes up the whole section, and the limitations made by the courts below were made by construction and not by separation. In the particular case at bar, the court below was asked and assented to the request, not to separate parts of a statute which might be constitutional, from other

parts which were manifestly unconstitutional, but to qualify the statute by judicial construction; to introduce words of limitation so as to make the statute specific and limited in its operation; in plain language, to make a law, and one which the Legislature of Texas never enacted. The fact that the limitation engrafted by the court upon the statute renders it practically impotent for mischief, does not relieve the dilemma, nor does it justify the court in its action, or validate the statute. We may assume from the decisions of this court, that a state cannot interfere with inter-state commerce in any manner, and upon this assumption, we think we hazard nothing in asserting that with this knowledge before the Texas Legislature, section 4 would never have been engrafted in these two acts. This section 4 is the basis of the action at bar. The proceeding of the state to forfeit the right of plaintiff in error to do business in the State of Texas, is based exclusively upon this section. The officers of the state, in asking a remedy, prayed the remedy invoked by the statute. Without section 4, the state had no case, and there was no law upon her statute books justifying this action. It, therefore, became fundamental to inquire into and determine, under the rules of law, whether or not section 4, by reason of its invasion of federal jurisdiction, became and was null and void. The judgment rendered by the court is a confession that section 4, according to its plain intent and meaning, was unconstitutional. This court has held, in repeated decisions already cited, that such defect could not be remedied by judicial construction, but that it belonged to the law-making power of the state to change the enactment and to adapt it to constitutional limitation. The Texas courts have attempted to do that which is forbidden by the decisions of this court. Their work is in the record, and cannot be controverted. The work is idle. The statute is unconstitutional, and we submit that nothing remains for this court but to say so and follow its own decisions.

V.

Said statutes of 1889 and 1895 are further violative of the Constitution of the United States, because they usurp and were intended to usurp the authority and jurisdiction of the United States, and the other states of the Union, in the mater of prosecution for acts occurring beyond the territorial limits of the State of Texas.

Dealy v. U. S., 152 U. S., 539-547.
U. S. v. Britton, 108 U. S., 199-204.
Black on Const. Law, Desty's Criminal Law, Sec. 55.
U. S. v. Boothe, 21 How., 524.

Both acts, hereinbefore set forth at length, contains this provision:

"Section 9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state."

A citation of the authorities above suffices to demonstrate the absurdity of this section, and its manifest attempt on the part of Texas to grasp jurisdiction not rightfully belonging to it. We content ourselves, therefore, with a mere statement of the proposition and authorities, adding in conclusion the opposite language of this court in an opinion delivered by Chief Justice Taney:

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence" (U. S. v. Boothe, 21 How., 524.).

VI.

The court below erred in holding, with the trial court, that the case at bar was a controversy of a civil nature and in approving the ruling of the court below, in refusing to instruct the jury, upon request by the plaintiff in error, that if upon all the evidence, the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in its features, and not a controversy of a civil nature.

In presenting this assignment of error, plaintiff in error is aware that under the rulings of this court, decisions of state courts are final in matters of procedure.

Oxley Stave Co. v. Butler Co., 166 U. S., 648.
Eagan v. Hart, 165 U. S., 188

We are also aware that on this writ of error the court must take the facts as found by the jury and can only consider whether the statutes involved, as interpretated to the jury, are in violation of the federal constitution. (M. K. & T. v. Haber, 18 Sup. Ct. Rep., 489).

The fact, however, that this assignment involves the very fundamental nature of the case, may take it out of the operation of the general rule. The court will recall what is already stated in the foregoing pages of this brief, that certain leading features of the case were eliminated on the trial by the judge of the court. The principal element of the state's complaint, as manifested from its petition, was the alleged combination between the Waters-Pierce Oil Company and the Standard Oil Trust, organized in New York City in January, 1882. From failure of proof, this feature was withdrawn from the jury by the trial judge. (R. p. 48). Other leading features of the combination, such as the purchase by the Waters-Pierce Oil Company of the Eagle Refining Company, and its employment of C. W. Robinson, J. L. Lewis and Stillwell Brothers on the pur-

chase by the plaintiff in error of the business of said concerns, were likewise withdrawn on the ground that the same were no violations of the laws of Texas. (R. p. 48). This left only four or five alleged transactions the subject of complaint between plaintiff in error, acting through its local agents in Texas, and certain dealers in oils in the State of Texas and it became a material inquiry as to guilty participancy on the part of the plaintiff in error with the acts of its agents, among many other instructions relating to the law of agency, all of which were refused. (R. p. 55). The court charged the jury, as in ordinary civil cases, that the burden of proof was on the state to show by a preponderance of evidence, the facts necessary to entitle it to recover. (R. p. 49).

The case being essentially one of a criminal nature, reasonable doubt should have been charged.

U. S. v. The Burdette, 9 Pet., 682.
Chaffee v. U. S., 16 Wall., 516.
Boyd v. U. S., 116 U. S., 610-637.
Wisconsin v. Ins. Co., 127 U. S., 265.
U. S., v. Shapley, 4 C. C. A., 237 (54 Fed. Rep., 126).
G., C.& S. F. R'y Co. v. Dwyer, 84 Tex., 194.

We submit the case, and ask that the judgment of the Texas courts be reversed, and the case remanded, with directions to the courts below to dismiss the suit on the ground of the unconstitutionality of the statutes upon which the prosecution is based.

John D. Johnson
Geo Clark
O C Bolinger

Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 334.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

We propose to argue one only of many questions arising in this case. We contend that the Acts of March 30th, 1889, and of April 30, 1895, of the State of Texas :

I. *Make penal all association of two or more persons for business purposes.*

II. *Render it impossible for two or more persons associated to carry on business*, and

III. *That the right of persons to associate and carry on business is one of the liberties protected by the Fourteenth Amendment to the Federal Constitution.*

The acts define a trust as follows:

> "A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any or all of the following purposes."

The words "combination of capital, skill or acts" embrace every method by which men can associate in business, whether by partnership, corporation, joint-stock association or by contract of any nature.

Parsons on Partnership (3d Ed., p. 6) thus defines a partnership:

> "The combination, by two or more persons, of capital labor or skill, for the purpose of business for their own benefit."

In 3 Kent's Commentaries (p. 23) partnership is defined as:

> "A contract of two or more competent persons to place their money, effects, labor or skill, or some or all of these, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions."

In 1 Lindley on Partnership (4th Ed., p. 3) will be found a number of definitions, all agreeing that partnership is a joinder by persons of capital, skill or acts in business, with a sharing of the common profits.

The combinations of capital, skill or acts by two or more persons, which the act condemns, includes, then, all partnerships, corporations and associations of any nature, having in view either, any or all of certain enumerated purposes.

In order to demonstrate that the act makes criminal all association for business purposes, it is only necessary to show that *one or more of the enumerated purposes is essential to every business association, whether partnership, corporation or joint-stock association, being*

so necessary a factor of the combination that the existence of the one implies the existence of the other.

PURPOSE—This renders it necessary to consider what the law regards as a "purpose." A purpose is a mental state, an intent, a design. Every man is *prima facie* supposed to intend every necessary or even probable or natural consequence of his own act.

> "If there be infraction of the law the intention to break the law must be inferred. * * * A man must be taken to have had the intention implied from the act."
>
> Broome's Legal Maxims, 7th Ed., p. 307.

If, for illustration, the effect of every combination is necessarily and naturally to prevent competition, the law must infer that such was the purpose of the combination, and it matters not whether this was the main purpose, a subsidiary purpose, or only a necessary consequence. As is well said in Bishop on Criminal Law, Sec. 337:

> "In the affairs of life it is seldom a man does any one thing, prompted by one motive alone, to accomplish one end. * * * Suppose, then, a man has several intents and in pursuance of them together moving him does what the law forbids. The rule here is, that, if there are the intents necessary to constitute the offense, and intents not necessary, the latter do not vitiate the former, which in their consequences are the same as though they stood alone. Thus, under the English statute against demolishing houses, if one object of a mob attacking a house is to injure a person in it, yet if another, and even inferior object, is to demolish the house, the offense is committed in consequence of this inferior intent."

Hence, if the main purpose of a partnership is to carry on a business, yet if the combination of persons as partners necessarily and naturally prevents competition between them, or violates any other of the pro-

visions of the act, that also, in contemplation of law, is a purpose of the combination.

The *purpose* must in any case be established by the *effect*. The act itself uses the words "purposes" and "effects" in the same sense. Section 7 provides that "*in any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination.*" The fifth clause of Section I. specifies one of the criminal purposes as follows: "to make and enter into, or carry out, or execute any contract;" and then follows a specification of numerous contracts which are made criminal. It is evident, then, that under this act a contract at any time entered into of the nature specified is to be considered one of the purposes of the combination. The mere entering into a contract by two or more persons forms a combination (for a contract is a combination), and the fact that they have made or carried out a forbidden contract whether express or implied is all the evidence of purpose required.

This is in accordance with the construction of the act by the Supreme Court of Texas. In Queen Insurance Co. vs. Texas, 86 Texas Rep., 250, GAINES, A. J., says: "A contract between two or more to do a thing is a 'combination of acts' of such persons to bring about the performance of the contract."

And in Texas & Pacific Coal Co. vs. Lawson, 89 Texas Rep., 398, DENMAN, A. J., says:

> "The portion of the act above quoted denounces as void and prohibits the enforcement at law or equity of every contract whereby a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities."

In the same case he says:

> "The word 'combination' as used in the statute means union or association."

It is manifest, then, that the act makes criminal the doing by two or more persons of any of the things specified as "purposes," and also the entering into or the carrying out by two or more persons of any of the contracts, obligations or agreements specified in clause 5 of Section I.

The things made criminal by the act as amended, whenever participated in by two or more persons, are as follows:

> "First, to create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of the State; second, to increase or reduce the price of merchandise, produce or commodities; third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities or to prevent competition in aids to commerce; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State; fifth, to make or enter into or carry out or execute any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition, among themselves or others, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest that they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

I. We now call attention to the prohibitions which we claim prevent all association of two or more persons in business, to wit:

A. Combinations of capital, skill or acts of two or more persons which prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or in aids to commerce.

B. The making or entering into or carrying out or executing any contract, obligation or agreement of any kind or description by which (two or more persons) shall in any manner *preclude a free and unrestricted competition among themselves* or others in the sale or transportation of any article or commodity, or by which

C. They shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

We do not claim that the act is unconstitutional because it makes criminal the union of capital, skill and acts which create restrictions in trade. That question has been settled by the cases of the United States vs. The Trans-Missouri Freight Association, 166 U. S., 190, and United States vs. The Joint Traffic Association, 171 U. S., 505. Our first claim is that the act is unconstitutional because it makes criminal contracts between two or more persons which "prevent competition," or which "preclude a *free and unrestrained competition among themselves* or others" and prevents the "union of any interests" which might in any manner affect prices.

Contracts "in restraint of trade" have so often been passed upon by the courts that they are now defined with some accuracy, and little doubt may be felt whether any given contract falls within the definition. But a contract "in restraint of competition" and particularly contracts between two persons which "preclude a free and unrestricted competition among themselves" are quite different from contracts in restraint

of trade. It is said by Justice PECKHAM in The United States vs. The Joint Traffic Association, 171 U. S., 505, 567 :

> " Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade."

It is certainly not difficult to show, however, that all such contracts are in restraint of competition and preclude a free and unrestricted competition between the persons entering into them.

How can there be association without prevention of competition between the persons associated ? What is competition ? It is the act of striving to gain what another is striving to gain at the same time. It is rivalry in the pursuit of the same object. In business, persons who are striving to secure the same customers for the same class of goods are competitors, and the means used to secure customers is competition. If they enter into any alliance by which they cease to be rivals, they are no longer competitors. If two who are in competition agree among themselves not to sell to the customers of the other they have restricted competition between themselves. So, also, if they agree as to the prices at which they will sell. But, more effective than all, if persons agree to unite their capital, skill or acts in co-operation in the same object and to divide the profits received, they thereby absolutely preclude competition between themselves. Instead of beings rivals they become associates. Instead of each striving to obtain his ends at the expense of the other, they work in harmony for an end which will mutually benefit them. Yet, this is an ordinary partnership. In fact, association is the antithesis of com-

petition, and all association of persons in business, whether as partners or corporators, prevents competition.

It is usual in articles of copartnership to stipulate that each partner shall devote his time and attention to the business of the firm, and shall not engage in any business in competition with the firm. This is an agreement to prevent competition, but even if no such agreement is entered into between the partners, the law implies it.

> "The first and highest duty which partners owe each other is that of perfect good faith. A partner must do what he can to promote the prosperity of the firm." * * * "It is quite well settled that a partner has no right to carry away his knowledge, his skill, his capital or his credit, his care or labor into another business, whether only his own, or that of another firm, to the injury of his first copartners. That is, he may not do this in such a way as to deprive them of business, of profits or advantages, which they had a right to expect from their connection with him."
>
> *Parsons on Part.*, 4th Ed., Sec. 153.

Undoubtedly the circumstances might be such, or the copartnership agreement such, that individuals composing the firm could legally compete with the firm, but such a case is barely conjectural. It is unusual and contrary to the true intent and purpose of a copartnership, which is co-operation and not competition.

Not only do partners not compete with each other in the business conducted by the firm; it is lawful for them to agree not to compete in any business. In Matthews vs. Associated Press of New York, 136 N. Y., 333, the Court says:

> "A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who comes in must agree not to do any other business and must give up all such busi-

ness as he had theretofore done. Such an agreement would not be in restraint of trade."

It certainly would be restrictive of competition.

Partnership not only prevents competition between the persons associated but restricts competition generally. That is, it leaves fewer persons to compete, and it gives the persons combined an advantage over individuals. There is no need to argue in relation to the advantages and power of association in business. It is so marked that the business of the world is carried on by its means. It is so great that many fear the abuse of the power, and would revert to the days of individual industry before machinery made association a necessity. It is this fear that gave rise to the law now being considered, and we are certainly in correspondence with the minds of the makers of this law when we admit that combination destroys competition between the persons combined, and restrains competition in general. The legislators in the State of Texas did their work effectually. Believing that where "combination is possible, competition is impossible," they have utterly destroyed the power of combination. The generalization contained in the popular saying is entirely too broad, and the Legislature arguing from a false premise struck too deep and have deprived citizens of a liberty without which modern business is impossible.

There is no possible escape from the obvious and self-evident proposition that any association in business prevents competition among the persons associated, and that, if prevention of competition is made criminal, association is made impossible. Prevention of competition is a purpose or effect of every copartnership, joint-stock association or corporation. It is a purpose or effect of every contract, agreement or understanding by which men associate or co-operate.

Prevent men from making contracts which preclude a free and unrestricted competition among themselves,

and we are at once relegated to the savage state. If association or co-operation is forbidden, unrestricted and unrelieved warfare becomes an enforced method in business.

II. *In addition to the provisions of the act which make associations for business purposes impossible, other provisions render business by two or more persons associated impossible.*

The following, among other things, are made criminal :

1. Combination of capital, skill or acts which increase or *reduce* the price of merchandise, produce or commodities, or

2. Which limit or reduce the production of commodities ;

3. Agreements by which persons bind themselves not to sell, dispose of, or transport any commodity or article of trade below a common standard figure ;

4. Or by which they shall agree to keep the price of such articles at a fixed or graduated figure ;

5. Or by which they shall in any manner establish or settle the price of any commodity between themselves and others, to preclude a free and unrestricted competition among themselves or others ;

6. Or by which they unite any interest that they may have in connection with the sale or transportation of any article that its price might in any manner be affected.

Possibly the most startling provision of this act is that which makes criminal combinations of capital, skill and acts for the purpose or having the effect of *reducing* the price of commodities.

The provision needs no comment. It is so plain that it is capable neither of construction nor misconstruction. When it is considered how wonderfully all the commodities which are used by civilized man, and are necessary in our modern trade and commerce, have been reduced in price during the century nearing its

close by the union of the capital, skill and acts of man, we must pause in wonder before an act which makes such a union for such purposes a felony, and inflicts upon those entitled only to gratitude and respect the most infamous penalties of the law.

Without dwelling upon this provision, however, we may ask how it is possible for two or more persons to associate in business if they may neither limit nor reduce their production, nor increase nor reduce the price of their commodities, nor agree not to sell below a common standard figure ; nor to keep the articles in which they deal at a fixed or graduated figure ; nor to settle the price either as between themselves or themselves and others ; nor to unite their interest so that price might in any manner be affected.

Let us admit that the law might wisely prevent a number of large competitive concerns, engaged in manufacturing a certain commodity, from agreeing to limit or reduce the production of the commodities they manufacture, or from agreeing to increase the price of the commodities which they sell or from fixing them at any standard or graduated figure, because such agreements deprive the public of the benefit of competition and enable dealers to arbitrarily fix prices. But to establish this as a general rule applying to all persons under all circumstances produces consequences which are absurd. It forces all persons to remain competitors and prevents association of any character. If two men have the privilege of associating as partners they must have power while thus associated to limit or reduce their prices and to fix their prices at standard or graduated figures. Take away this right and you destroy their power to carry on business.

We cannot find language more forcible to describe the vicious consequences of the act than that used by Justice SWAYNE *In re* Grice, 72 Fed. Rep., 642.

> "We will assume that A and B agree to combine their capital, skill and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain

commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the cost of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common-standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price, up or down, as the cost of production may vary. Finding after a time their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times, their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it.

"If persons combined cannot carry on business without entering into, executing and carrying out contracts, obligations and agreements by which they shall settle the prices of any article as between themselves, or themselves and others, and bind themselves to sell their commodities at a figure, or graduated figure, and not to sell below a common standard figure, or if they cannot carry on business without raising and lowering prices, and increasing and diminishing their productions, at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes or purposes essential to the main purposes is not of the slightest consequence."

"The vice of the act in question is that it attempts to prevent too much; it does not stop at reasonable limits; it is not content with making criminal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which unreasonably restrict competition; it condemns any agreement or arrangement which prevents competition between two or more persons entering into it. It not only prevents com-

petitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint owners and copartners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill and acts for the purpose of increasing prices: it reaches the very acme of absurdity in preventing persons from uniting their capital, skill and acts for the purpose of reducing prices. The Legislature perhaps had in mind that which might possibly be a means of public oppression—to wit, the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not discriminate, because of the want of ordinary care in studying the meanings of words, that we have on the statute books of Texas at this close of the nineteenth century, during which combinations of capital and skill have cheapened the price of products to an extent unparalleled in the world's history, an act making it a highly penal offense for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell."

We have confined our argument principally to the effect of the act upon association, but the Court cannot help noticing that its effects are not limited to persons associated. It prevents agreements or obligations between joint owners and like combinations of capital. Tenants in common of a farm can no more agree upon production and prices under this act than partners. But it reaches still farther. The process of bargain and sale is an agreement between two or more persons fixing a price upon commodities. If the price cannot be settled or established, the contract of bargain and sale is impossible. The prohibition of all contracts in restraint of competition likewise prohibits contracts between employer and employee, agreements for the sale of good-will and many others which might be mentioned. We will hereafter refer to a multitude of cases in which contracts have been upheld which this act makes criminal.

Legislative Intent.

It is earnestly contended by the learned counsel for Defendant in Error that the Legislature did not intend to interfere with corporations or partnerships or the right of association because by the same act it recognized their existence, and by other acts passed at the same term created others. That the act recognizes associations as already existing—a fact which could not be ignored—cannot defeat the plain language which renders their future existence penal. Neither can the plain language of a statute be altered by reference to other statutes.

This Court has often held that "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they plainly expressed, and consequently no room is left for construction."

Fisher vs. Blight, 2 Cranch, 358, 399.
Schooner Pauline's Cargo vs. The United States, 7 Cranch, 52, 60.
United States vs. Freeman, 3 H., 556, 565.
McPherson vs. Blacker, 146 U. S., 1, 27.

And Art. 9 of the Texas Penal Code requires a penal statute to be construed "according to the plain import of the language in which it is written."

It is only when the sense is doubtful that resort can be had to the consideration of other statutes or other parts of the same statute. The rule is that in construing a *doubtful* statute, and for the purpose of arriving at the legislative intent, all acts *in pari materia* are to be taken together and examined, in order to arrive at the true result. But the statute under consideration is not doubtful, and other statutes creating corporations are not *in pari materia*. The word *par*, as was said in United Society vs. Eagle Bank, 7 Conn., 457, 469, intimates not likeness merely, but identity.

Certainly this anti-trust act is not identical with acts creating corporations, and cannot be construed with them as one act. The intent is to be derived when possible from the language of the statute, and the plain meaning of that language cannot be ignored in order to avoid unforeseen results. The act says, "two or more persons shall not make, enter into or carry out any contract, obligation or agreement of any kind or description by which they shall establish the price of any article or commodity between themselves or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity." What extrinsic aids can be brought to the interpretation of those words which will alter their plain meaning? By what rule of interpretation can it be claimed the Legislature did not intend to include certain persons when the language includes all persons, or certain agreements when the language includes "any contract, obligation or agreement of any kind or description?"

How can it be claimed that the Legislature intended to make penal only contracts in restraint of trade when in addition thereto it adds clause to clause in multiplication of crimes?

How can it be said that by "restraint of competition" is meant that general restraint of competition which has been recognized by the Courts as being in restraint of trade, when the act adds another clause thereto preventing anything which shall preclude free and unrestricted competition between any two or more persons under any circumstances?

The Court cannot construe out of the act what is plainly written in it. It cannot say that the Legislature meant that two persons might prevent competition between themselves by entering into partnership, because the act says the contrary. It cannot say the act does not make criminal such a combination of capital and skill by two persons as produces a reduc-

tion of prices of a commodity, for the act says the contrary. It cannot say that the Legislature did not intend to prevent two persons who jointly owned an article from agreeing upon its price, for the act says the contrary. Some associations and some agreements about production and price may well deserve the penalties of the law, but when the law attempts to strike down all associations and all agreements about production and prices it produces consequences which it is quite probable no legislator ever foresaw and, in that sense of the word, never intended.

The learned counsel for Defendant in Error make no attempt to justify the act if it is to be interpreted "according to the plain import of the language in which it is written." Their contention is (pages 65 and 66 of brief) that all the prohibitions of the act prohibit nothing more than restrictions in trade. This, then, is the issue upon this point. We contend that competition may be restricted without restricting trade, and in this the defendant agrees with us (page 69 of brief). We contend that agreements between two or more persons associated, fixing prices upon their commodities or increasing or reducing their prices, are not in restraint of trade. This, defendant does not deny, and the question at issue is: Does the act prohibit such agreements? We appeal to the plain language of the act.

Construction of the Act by the Supreme Court of Texas.

It is also claimed that the Supreme Court of Texas practically holds that this act does not interfere with partnerships, corporations and like associations. This is the reverse of the fact. In the earliest case arising under this act, Queen Insurance Co. vs. Texas, 86 Texas Rep., 250, GAINES, A. J., went outside of the matter at issue to show the disastrous results which

would ensue if this act was construed according to the plain import of the language in which it is written as required by the penal code of Texas, and intimated that the consequences might be so disastrous as to have a bearing on the question of intention in spite of the code provision, but the point decided was that insurance was not an "article" or "commodity," the only interpretation of the act being of the words "article," "commodity" and "trade."

The subsequent case of Houck & Dieter vs. Anheuser-Busch Brewing Association, 88 Texas Rep., 184, arose upon a partnership agreement for the sale of beer in El Paso. The partnership was held to be a combination such as was prohibited by the act. The decision was based upon the fact that the brewing company bound itself to sell beer exclusively to the copartnership in El Paso. GAINES, C. J., said it was a question whether irrespective of this feature the contract was not prohibited by the act, since the act makes no distinction between restraints which are reasonable and which are unreasonable.

In Welch vs. Phelps and Bigelow Windmill Co., 89 Texas Rep., 653, it was held that the act did not prevent a principal from agreeing with his agent about the price of consigned goods. DENMAN, A. J., says: "the purpose of the statutes was to prohibit two or more persons, &c., from uniting or associating their otherwise independent, separate and possibly competing capital, skill or acts for one or more of the five purposes therein specified." This opinion certainly indicates that a partnership formed by competitors, or possible competitors, is embraced within the act.

Texas & Pacific Coal Company vs. Lawson, 89 Tex. Rep., 394, brought before the Court a lease of a parcel of land upon which to establish a saloon, combined with the exclusive right to sell liquors upon lands of the coal company, the rental being a "sum equal to two-thirds of the net profits arising from said business monthly during the terms of this lease." This, so far

as the business of selling liquor is concerned, was purely a partnership agreement. DENMAN, A. J., after quoting from the Act, says :

> " The portion of the Act above quoted denounces as void and prohibits the enforcement at law or equity of every contract whereby a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities. The statute ignores the common law distinction between restrictions which are reasonable and those which are not, and commodities which are of prime necessity and those which are not. The word combination as used in the statute means union or association. It is clear that the contract provided for and contemplated a union or association of capital and acts by the Coal Company and Lawson.
>
> " In order, however, for the contract to be within the inhibition of the statute the combination must have been formed for one of the purposes therein specified. Was its purpose either to create or carry out restrictions in trade or to prevent competition in sale or purchase of commodities ? The Court has held that, as here used, the word trade means traffic, and the word commodities means any movable or tangible thing that is ordinarily produced or used as subject of barter or sale. It is clear, then, that dealing in liquors contemplated by the contract is trading, and their purchase and sale is of commodities within the statute.
>
> " We are of opinion that the purpose of the combination was to create and carry out a restriction in the sale of liquors at Thurber, and also to prevent competition in the purchase and sale thereof."

Gates vs. Hooper, 90 Texas Rep., 563, arose upon a sale of a stock of goods by one merchant to another, the seller agreeing to retire from the mercantile business in Batesville and use his efforts to secure custom for the buyer. DENMAN, A. J., pronouncing the agreement not within the Act, says :

> " In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts

by two or more. Combination, as here used, means union or association. * * *

"When we consider the purposes for which the combination must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of capital, skill or acts denounced is where the parties in the particular case *designed the united co-operation of such agencies, which might have been otherwise independent and competing*, for the accomplishment of one or more of such purposes."

It follows, necessarily, from this language that if these two country merchants had entered into a partnership or other combination or association they would inevitably have subjected themselves to the penalties of the act and been liable to a possible fine of $5,000 and imprisonment of ten years for each day of the continuance of such an association. There would have been no possible way for a Court to have resisted the conclusion. Even as the case stood it was decided, in disregard of the language of GAINES, A. J., in Queen Ins. Co. vs. Texas, 86 Texas Rep., 250, 264, that "an agreement between two or more persons, by which one of them undertakes to bind himself not to follow his trade or to practice his profession in a territory of prescribed limits, is a 'combination' within the meaning of the statute under consideration."

The only other cases of which we have knowledge involving a construction of this act are Texas Brewing Co. vs. Templeman *et al.*, 90 Texas Rep., 277, and Fuqua *et al.* vs. Pabst Brewing Co., 90 Texas Rep., 298. The contracts and the decisions in both cases were essentially the same. In the former, GAINES, C. J., says:

"The contract we think is a combination of capital, skill and acts. Was the combination unlawful? By the agreement the Brewing Co. bound itself to give to Norwood & Co.

the sole representation and sale of its products in and near the Town of Navasota, and the latter placed themselves under the reciprocal obligation to sell no other beer than that of the company. The effect of the contract is evidently to create and 'carry out restrictions in trade,' and to 'prevent competition' in the 'sale and purchase' of 'commodities'—namely, beer and ice."

Take further the decision of the Courts in this case now being argued as illustrative of the construction of the act by the highest Courts of Texas. The learned Judge of the District Court, who was affirmed by the Courts above, after quoting the first section of the act, further charged as follows:

"Now, if you find from the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying and selling oils, as named and set out in plaintiff's petition since July 6th, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively for any specified time and from no other source in consideration of rebates allowed them by defendant company or for any other valuable consideration; or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all their oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company; or if said defendant company, so acting since said date, made and entered into and carried out in this State a contract with any of the parties, as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company either verbally or in writing to buy all their oils exclusively from

> defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, * * * you will return a verdict for the plaintiff against the defendant Waters-Pierce Oil Company."

The contracts stated by the Court as violative of the act are three, and may be briefly summarized as follows:

1. Contract to buy oil from one company exclusively for any specified time, for any valuable consideration.

2. Contract to buy oils from one company and not from any other source for a specified time, and not to sell said oils to persons handling competitive oils.

3. Contract to buy oils exclusively from one company, and to sell the same at a price fixed by said company.

We shall not take the time of this Court in defense of each of the contracts above stated, but will consider briefly the first one upon which the jury were authorized to find defendants guilty, to wit: A contract to buy oil from one company exclusively for a specified time for any valuable consideration.

It may seem to require a broad construction of the language of the act against prevention of competition to bring such a contract within it. If a contract by A to purchase all his supplies of a particular commodity from B for a specified time, for a valuable consideration, is restrictive of competition, it is easy to enumerate dozens of similar ordinary and innocent business contracts which are equally so. No man engaged in business can safely enter into contracts while such a law governs, lest he become a criminal. The Legislature has certainly set a net, not only large enough to catch all possible offenders, but thousands who are guiltless of any wrong. Yet we cannot say that the interpretation was too broad. There was a contract and, therefore, a combination. It prevented competition in the sale of oil to the purchasers for the time limited, which any large purchase by them would equally have

done. It settled the price of a commodity between the parties to the contract, as every contract of sale does. It was a union of interests in connection with the sale of an article by which its price might be affected. The Court being bound by statute to "adhere to the plain import of the language in which the act is written," possibly could not have charged otherwise.

It will not do, however, in view of these interpretations by the highest court of Texas to say it has defined the act contrary to its plain language as only preventive of restrictions of trade. As defined by the Court the act makes criminal contracts of the most innocent character. In Chicago, St. Louis & N. O. R. R. Co. vs. Pullman Southern Car Co., 139 U. S., 79, a contract to furnish a railroad company with drawing-room and sleeping cars for fifteen years, the railroad agreeing not to "contract with any other party to run the said class of cars on and over said lines of road during said period of fifteen years, was held to be not at all in restraint of trade." It certainly was in restraint of competition.

So, too, the contracts and arrangements held not to be in restraint of trade in the Express Cases, 117 U. S., 1, would be clearly criminal under the Texas Act.

So the arrangements as to sale of stocks pronounced in Williams vs. Montgomery, 118 N. Y., 519, 525, to be "a reasonable, just and honest purpose which the law does not condemn," was clearly in restraint of competition.

In Brown vs. Rounsavell, 78 Ill., 589, and Newell vs. Meyendorff, 9 Mont., 254, contracts to sell exclusively to one party were held good.

Scores of cases can be cited in which contracts were held legal and innocent and not in restraint of trade, which would clearly be criminal under this act. It will be sufficient to refer to the cases cited by SANBORN, J., in United States vs. Trans-Missouri Freight Association, 58 Fed. Rep., 58, 72, and to the cases hereafter cited in this argument.

It being evident, then, that the Legislature intended the plain import of the language used, and that the Supreme Court of Texas has construed the act in accordance therewith, there can be no escape from the conclusion that the act prevents all contracts, arrangements or union of capital, skill and acts which preclude free and unrestricted competition among the two or more persons so agreeing or uniting, and that persons so uniting are precluded from any understandings or agreements in relation to the prices of the articles in which they deal. We, therefore, earnestly assert:

III. *The right of persons to associate and carry on business and to enter into contracts necessary to their business is one of the liberties protected by the 14th Amendment to the Federal Constitution.*

The Constitution protects liberty of contract, except in so far as that liberty encroaches upon the liberty of others; among the rights of contract thus protected is the right of men to associate together in the conduct of business, and to unite their capital, skill or acts therein; including also the right, while thus associated, to agree upon the amount of their production, and the prices at which they will buy and sell, which necessarily embraces also the right to raise and lower the prices of the commodities in which they deal, and to keep them at a fixed price.

In Allgeyer vs. Louisiana, 165 U. S., 578, the Court, through Mr. Justice PECKHAM, says, p. 589:

> "The liberty mentioned in that (XIV.) amendment means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying

out to a successful conclusion the purposes above mentioned."

Again the learned Justice says:

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding or selling property, must be embraced the right to make all proper contracts in relation thereto."

It was said by Mr. Justice BRADLEY in the *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S., 746–762, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again, on page 764, the learned Justice says: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." The following New York cases are important on this point.

Bertholf vs. O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
People vs. Marx, 99 N. Y., 377.
People vs. Gillson, 109 N. Y., 389.
Forster vs. Scott, 136 N. Y., 577.

In the Gilson case Mr. Justice PECKHAM, referring to the former cases, said (p. 398):

"The following propositions are firmly established and recognized: a person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.

"The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the

> person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

There is no liberty more sacredly guarded than the right of contract. The language of *Printing Co. vs. Sampson*, 19 Eq. Cases, 462, has been adopted by several American courts.

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

And in the *U. S. Chemical Co. vs. Provident Chemical Co.*, 64 Fed Rep., 946, the Court says:

> "The right to contract is a cardinal element of constitutional liberty, and as such should be jealously guarded."

The courts of many States of the Union have guarded this right of contract by declaring unconstitutional acts which infringed upon it. In Pennsylvania the statute forbidding manufacturers from paying wages in orders was held unconstitutional, as being an attempt to prevent persons *sui juris* from making their own contracts (*Godcharles vs. Wigeman*, 113 Pa. St., 431). The U. S. Circuit Court in Ohio declared unconstitutional a statute preventing railroad companies from contracting with employees in respect of personal

injuries (*Shaver vs. Pa. Co.*, 71 Fed. Rep., 931). The Ohio Supreme Court held an act relating to mechanics' liens void because it interfered with the right of contract (*Palmer vs. Tingle*, 45 N. E. Rep., 313). In Illinois the Truck-store act, the coal-weighing act and other legislation has been set aside for the same reason.

Frorer vs. People, 141 Ill., 171.
Ramsey vs. People, 142 Ill., 380.
Harding vs. People, 160 Ill., 459.
Richie vs. People, 152 Ill., 98.

Legislation has been pronounced unconstitutional in other States on the same ground.

Kuhn vs. Detroit, 70 Mich., 534.
Spry Lumber Co. vs. Trust Co., 77 Mich., 199.
State vs. Loomis, 115 Mo., 307.
State vs. Julow, 129 Mo., 163.
State vs. Goodwill, 33 W. Va., 179.
Ex parte Kuback, 85 Cal., 274.
Low vs. Rees' Printing Co., 41 Neb., 127.
In re Eight Hour Law, 21 Col., 29.
Com. vs. Perry, 155 Mass., 117.

Among the rights of contract thus protected is the right of men to form business relations among themselves.

Judge COOLEY says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice" (Cooley on Torts, 278). The reverse must be equally true. A man may form business relations with whom he pleases, and in the conduct of such relations the persons thus associated may fix or limit the character and amount of their business or production, and the prices they will charge for the products which they manufacture, in which they deal or about which they contract.

In past ages the government exercised an almost unlimited power to control prices of commodities and labor, but, says Tiedeman, "Under a constitutional popular government there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that the like freedom should be secured and enjoyed in determining the condition and terms of the contract which constitutes the basis of the business relation or transaction. It is therefore the general rule that man is free to ask for his ware or his services whatever price he is able to get and others are willing to pay" (Tiedeman's Limitations of Police Power, 233).

What one man may do individually, two or more may do when lawfully associated in business relations.

It is not denied that the Legislature, in the exercise of police power, may infringe upon the liberty of the citizen and restrict even the right of contract; but as said by Tiedeman, Limitations of Police Power, Section 1, "any law which undertakes to abolish rights, the exercise of which does not involve an infringement on the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government."

Again, on page 197, he says:

> "It is also a judicial question whether the police regulation extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The Legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil."

All these views are well supported by authority. We need cite but few of the many cases which hold that the Legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning health, safety or the welfare of society, and the courts may examine into and annul such illegal legislation.

T. W. & W. R. Co. vs. Jacksonville, 67 Ill., 37.
Coe vs. Shultz, 47 Barb., 64.
Quintini vs. City of Bay St. Louis, 1 South. R., 625.
Town of Lake View vs. Rose Hill Co., 70 Ill., 191.
Thorpe vs. R. R. Co., 27 Vt., 140.
Lowry vs. Rainwater, 70 Mo., 152.
Jeck vs. Anderson, 57 Cal., 251.

In People vs. Gillson, 109 N. Y., 389, 400, Mr. Justice PECKHAM said :

> "This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the State. That power has never yet been fully described nor its extent plainly limited further, at least, than this ; it is not above the Constitution, but it is bounded by its provisions ; and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the Legislature or the executive of the police power. The extent of this power has been the subject of discussion in this court, and in the recent and most important case of *In re* Jacobs (98 N. Y., 107), the question was examined and most exhaustively reviewed by EARL, J., in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the Legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the Constitution of this State ; and that if the Legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts."

In Colon vs. Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the general rules laid down by the above authorities. The Court said, "equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power (People vs. Marx, 99 N. Y., 377, 387). Under the mere guise of a statute to protect against wrong, the legislature cannot arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods (People vs. Arensberg, 103 N. Y., 399). This power can be exercised only to promote the public good, and is always subject to judicial scrutiny (Forster vs. Scott, 136 N. Y., 577, 584). Whenever the legislature passes an act which transcends the limits of the police power it is the duty of the judiciary to pronounce it invalid and to nullify the legislative attempt to invade the citizens' rights (People *ex rel.* Nechamcus vs. Warden, 144 N. Y., 529, 535). That power must be exercised subject to the provisions of both the Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (Health Department vs. Rector, 145 N. Y., 32, 39)."

Police Power and Public Policy.—The question whether the Legislature has passed the limit of its police power in enacting the law in question may be tested by the well-known legal principle of "public policy." Public policy is a branch of police power, applied by the courts, whereby individuals are pre-

vented from doing that which is injurious to the public or against the public good. Individuals are forced to yield portions of their natural rights when the exercise of these rights interferes with the good of the public. It is sometimes said that the Legislature creates public policy. By this is meant only that the Court cannot declare that to be contrary to public policy which the Legislature has legalized.

But the Legislature cannot create "public policy" in destruction of constitutional rights, nor in restriction of individual liberty, unless, in judicial opinion, such restriction is necessary for the public welfare. The validity of such laws always depends upon the question whether the enacted restrictions are demanded by public policy. No Court has ever held it to be contrary to public policy for persons to combine their capital, skill or acts with the purpose of, or (what is the same thing) with the effect of, preventing competition. No Court has ever held it to be contrary to public policy for persons to enter into agreements which preclude free and unrestricted competition among themselves. No Court has ever held it to be contrary to public policy for persons to unite capital, skill and acts, for the purpose of reducing the price of commodities. No Court has ever held contrary to public policy any union of interest which in any manner affects prices. No Court has ever held it to be contrary to public policy for persons united in business, whether as partners or corporators, to agree among themselves as to their production or prices, or to alter them as they may be able or the necessities of trade may demand. On the contrary, from the days of Magna Charta these things have been in accordance with public policy. The right to associate has been unquestioned; the right to unite capital, skill or acts has, from the earliest dawn of civilization, been free. Industry has not been carried on by unassociated individuals. Association has ever been a business necessity. Without it machinery could not have been

utilized, manufactories could not have been created, commodities could not have been transported. Railroads, telegraphs, steamships, mines, factories are rendered possible only by combination of capital, skill and acts, for the express purposes prohibited by the Texas act, and particularly for the purpose, and, as history proves, with the inevitable effect, of *reducing* the prices of commodities. The question of a return to individual industry involves a choice between civilization and barbarism—a choice between industry as now carried on in our commercial centres and as carried on in some of the rural and mountainous portions of our country, where as yet no combination of capital, skill or acts has taken place.

Agreements Which Prevent Competition Were Never Void at Common Law.

We desire to extend this argument in order to strengthen the position we have taken and to meet a possible objection to it. The assertion is often made that agreements which "prevent competition" are in restraint of trade, are contrary to public policy and void at common law. To this we reply that many agreements which prevent competition were never held to be in restraint of trade nor contrary to public policy nor void at common law, but the right to enter into such agreements has always been recognized as an undoubted liberty of citizens. The best evidence of this assertion is that the right to enter into copartnership has always been upheld, and corporations have always existed by virtue of law.

But this point upon which misapprehension exists to such an extent as to lead even careful Judges to a misuse of language seems to require further elaboration, although words seem powerless to make much clearer the simple proposition that copartnerships do prevent competition, and that all contracts in prevention of competition were never void at common law.

DIFFERENCE BETWEEN DICTA OF JUDGES AND STATUTE LAW.—It is admitted that cases can be cited in which Judges, delivering opinions, have said that whatever restricts competition, or has a tendency thereto, is void. But there is a vast difference between the effect of language in a judicial opinion and the same language in a statute. The language of the one must be interpreted in its application to the facts in a particular case, while the language of the other must be interpreted according to the literal meaning of the words. Hence the common law is fluid and adaptable to circumstances, while statute law is solid and not capable of adaptation. When a Court condemns restrictions of competition we study the facts of the case to learn the character of the restrictions condemned ; when a statute condemns restrictions of competition it does so without qualification, without exception, without regard to circumstances, and without consideration of the reasonableness or unreasonableness of the restrictions.

HISTORY OF LAWS AGAINST COMBINATION.—Going back to the beginning of our common law we will find that all laws against combination because restrictive of competition were statutory, and a brief reference to these statute laws and the reason and spirit of them will serve to show that the right to form associations is a part of that liberty which cannot be safely yielded into the hands of any legislative body.

At the foundation of all the statutes against trade combinations lies the idea that prices can be regulated by law. In a brief review in the second chapter of Thorold Rogers on " The Economical Interpretation of History " it is said that laws fixing prices on wheat and beer are so old that they are undated. An example of early statutes is 37 Edw. III., which fixes the prices of poultry, regulates the diet and apparel of servants, ordains that handicraftsmen shall use but one mystery, and is also the first statute against engrossing to enhance prices.

By very early statutes local authorities were empowered to fix prices on almost all products. Many statutes were enacted regulating prices of meat and clothing. Early attention was paid to the rate of wages, because prices were supposed to be dependent upon wages. The first of the infamous Statutes of Laborers was 23 Edw. III., A. D. 1349. This punished employees for taking wages higher than those fixed by law, and employers for paying them. It also attempted to compel the sale of all manner of victual at reasonable prices. It was but natural that workmen should combine against such laws, and consequently in a new Statute of Laborers, 34 Edw. III., A. D. 1360, we find the first statute against association, in the provision that alliances, covines, congregations, chapters, ordinances and oaths made, or to be made, by masons or carpenters should be void and annulled. This provision is contained in a statute which prescribed that fugitive laborers should be branded with the letter F. The Statute of Laborers was amended and re-enacted in various reigns with divers provisions against confederacies of workingmen. 3 Hen. VI., C. 1, was an act against confederacies and yearly congregations of masons in general chapters, and 15 Hen. VI., C. 6, prohibited guilds of laborers and artificers. From 23 Edw. I. to James I., thirty-seven acts against laborers were passed. All were repealed and a new one framed, 5 Eliz., C. 4. This system of infamous laws which enslaved the laborer was not finally swept from the statute book until 1825.

During the same periods numerous other statutes were passed fixing prices upon products, endeavoring to prevent enchancement of prices, and in some cases to prevent lowering of prices. They are too numerous for enumeration. They will be found in "Pickering's Statutes," and many of them are referred to and quoted in an able and interesting work just published by Albert Stickney, of the New York bar, entitled

"State Control of Trade and Commerce." The best known of the statutes of this character is 5 and 6 Edw. VI., C. 14, relative to forestalling, regrating and engrossing, which act created a variety of offenses, even punishing such persons as were guilty of "making any motion by word, letter, message or otherwise for the enchancing of the price or dearer selling of anything or things above mentioned," and also those who got "into his or their hands by buying, contracting, or promise-taking to the intent to sell again." In relation to all of these acts, it may be said they prevented dealings by wholesale, and are utterly incompatible with modern business. They were all, some thirty-six in number, swept away by the statute 7 and 8 Vict., C. 24, with the confession that they created the evils they sought to alleviate.

The offenses of the character above enumerated, created by statutes, became known as "offenses against trade." The persons who, through a union of capital, skill or acts, produced any of the prohibited results became guilty of a conspiracy against trade. In the Law of Criminal Conspiracies and Agreements, by R. S. Wright, p. 12, n. 6, it is stated that the crime of conspiracy is statutory, and not of common law, and that the different statutory laws relative to conspiracy were enacted in aid of statutes such as enumerated, as, for instances, the various Statutes of Laborers, the Statute of 27 Edw. III., A. D. 1353, making it a felony for merchants to make "conspiracy, confederacy, covine, imagination, evil device or murmur," for the disturbance of the staples and of the price of wool, and many similar. Whether this be correct, or whether the crime of conspiracy ante-dated the statutes, it is evident that conspiracy against trade once embraced scores of statutory offenses not now deemed illegal.

The Right to Form Partnerships Always Existed. And here is a point which cannot be too strongly im-

pressed upon the judicial mind, that amid all this madness of legislation, and during the centuries when a mistaken belief prevailed that any alliances, covines or associations of persons engaged in business had the tendency to injuriously affect prices and interfere with trade, the right to form partnerships in business existed and was recognized as a common law right. This is evident from the fact that no case has been found in which the right has been questioned. It is evident also from the few statutes by which the right was limited. Of these we have discovered only two, but it is probable there were others. The statute, 28 Geo. III., C. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale. The statute, 17 Geo. III., C. 42, prevented combinations by copartnership, or otherwise, in the purchase or sale of bricks.

Copartnerships were therefore recognized as combinations which prevented competition and effected prices. How could it be otherwise? And yet in spite of a frenzy in relation to combinations to affect prices which Adam Smith compared to the witchcraft craze, the partnership remained unmolested. For this no other reason can be given than that the right to form partnerships was a portion of that liberty which was secured by Magna Charta, of which no freeman might be deprived. "*Nullus liber homo, &c.*" These words, says PARKER, C. J., in *Mitchel vs. Reynolds*, 1 Smith's L. C., 511, "have been always taken to extend to freedom of trade." Therefore Parliament, in its omnipotence, respected the right, and even Judges affected by the prevailing craze permitted it to exist unchallenged.

The laws relative to partnership existed as Lord COKE said, "*per legem mercatoriam*, which, as hath been said, is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*." And so the right of association in business continued as one of the sacred

liberties of free citizens almost untouched through all those centuries in which, as Buckle says, "every European government, which legislated respecting trade, acted as if its main object was to suppress the trade and ruin the traders. Laws to regulate wages, laws to regulate prices, laws to regulate profits; interference with markets, interference with manufactories, interference with machinery, interference even with shops."

Corporations. The long continued battle against corporations, while partnerships went unscathed, shows that it was not combinations *per se*, but peculiar methods of combination which excited legal animadversions. Corporations could only be created by king's patent, or act of Parliament, consequently there was no need of anti-corporation laws.

Most corporations were, in fact, monopolies by virtue of their charter, but corporations, as such, were denounced as tending to obstruct the free use of labor, as limiting competition, as putting down individual industry, and affording facilities for combinations among tradesmen for defrauding the public. The subject is discussed by Adam Smith and other political economists. But corporations vindicated their right to exist, notwithstanding these fears.

Joint Stock Associations. One form of partnership was condemned by law in a manner which suggests the statute under consideration; namely, a partnership with transferable shares, or a joint stock association. The statute, 6 Geo. I., C. 18, declared associations for commercial undertakings with transferable shares to be a common nuisance, and inflicted the penalty of imprisonment for life and confiscation of goods. Even this severity of punishment has been imitated in the Texas act. This statute, which is known in history as the "Infamous Bubble Act," was during its existence a dead letter and was long ago repealed.

Joint stock associations existed in spite of it, otherwise England's rapidly developing industries could never have been carried on. Few persons were convicted under it and none were punished. The law was simply futile, says Lindley in his work on Partnership, page 6. In fact, it is doubtful if these old statutes relative to combinations to enhance prices were ever enforced. An investigation confirms what is said by Stickney in the work above cited: "The reports of cases in the English Courts show an almost entire absence of even so much as an attempt to enforce these old statutes. In time, by common consent, the statutes making such combinations criminal became obsolete. It was found by experience that they could not be enforced, and that their mere existence, with occasional sporadic attempts at enforcement, did more harm than good." The cases arising under the Bubble Act seem to be the first in which it was urged that whatever interfered with competition is contrary to law.

CASES UNDER THE BUBBLE ACT: In *R. vs. Webb*, 14 East, 406, and *Pratt vs. Hutchinson*. 15 East, 511, it was strongly urged that the grouping together of numbers of persons, with transferable shares, for the purpose of carrying on trade, was calculated to put down individual industry and competition. It was said "if fifty persons may do this, why may not a thousand?" This argument of danger in numbers applies to an ordinary partnership as strongly as to a joint stock association. It did not prevail with the Court in those cases. It is true that Lord ELDON was of the opinion that companies with large capitals and with transferable shares were injurious to the public and illegal, independent of the act referred to (1 Lindley on Part., 193), but this opinion did not prevail, and such associations after some fluctuations of opinion were finally held to be legal unless affirmatively shown to be of a dangerous or mischievous character (1 Lindley on Part., 194).

Thus it is evident that while the statutory law and the dicta of Judges in some cases went to absurd lengths against certain forms of association, the right of association, notwithstanding the recognized and established fact that it limits competition, was never denied, and has existed under the protection of law from the days of the adoption of the law merchant until the present time. Never, either by common law nor by statute law, were all agreements in restriction of competition illegal. Such agreements were among the most ordinary and necessary in commercial life, and the right to enter into them was one of the most cherished liberties of the citizen.

The Court, by BOWEN, J., in Mogul S. S. Co. vs. McGregor, 23 Q. B. D., 598, stated a principle which was always a principle of the common law, as follows:

> "The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse for the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—would be only another method of attempting to set boundaries to the tides."

This case is authority, if authority could be needed, for the proposition that combinations which restricted competition, and which prevented competition between the persons combined, never were illegal by the com-

mon law of England. This conclusion cannot be doubted when it is remembered that the statute laws of England never went to the length of preventing all association.

REVIEW OF AMERICAN CASES: We now desire to review briefly the American cases in regard to restrictions of competition.

It will not be questioned that the right of persons to associate themselves and their capital and skill has existed in this country from the earliest colonial times, and has been exercised to a greater extent than in any other country. All the important business of the land is conducted through firms, associations and corporations. If there are cases which decide combinations in restriction of competition to be illegal, they are in direct variance with the industrial history of the country and with the statutes of all our States which authorize the creation of partnerships and corporations. But an examination of the cases will show that it is not association *per se*, but only certain associations which have been condemned. The language of Judges may have been broader than this, but such language must be qualified in its application to the particular facts of the cases.

The first American case in which an opinion was enunciated, which, carried to its full extent, would be fatal to association, was *Hooker vs. Vandewater*, 4 Denio, 349.

The Court (JEWETT, J.) says: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it."

This is the first case in which we find this language used. The familiar maxim is ancient enough, but the conclusion that "whatever relaxes competition in trade is injurious, if not fatal, to it," seems to have been an original deduction of the Judge in the case, and can hardly be accepted as conclusive either in law or economics.

The citation of authority for this language is *People vs. Fisher*, 14 Wend., 9. *People vs. Fisher* was an indictment for a conspiracy of shoemakers to raise wages by striking, and was sustainable, if at all, on the ground that the workmen used illegal means to accomplish a legal purpose. It did not use, and was never authority for, the language quoted. *Hooker vs. Vandewater* was the case of a pooling agreement between several individuals and firms, the proprietors of five several lines of boats on the Erie and Oswego canals. They did not unite their capital, skill or acts. They were competitors and pooled their profits solely for the purpose of controlling or raising prices, which were to be established by agreement of all the parties interested. The language of the Court must be interpreted in its application to the case, and, being so interpreted, means only that pooling agreements between competitors for the purpose of controlling prices are contrary to public policy. This is very distinct from a combination of persons, capital, skill or acts in one firm or corporation, by means of which parties cease to be competitors and work for a joint interest.

The case of *Stanton vs. Allen*, 5 Denio, 434, was likewise a pooling agreement among the proprietors of boats on the Erie and Oswego Canals, by which they regulated the price of freight and passage by a uniform scale, and divided the profits according to the number of boats employed by each.

There was no common ownership of the capital employed; there was no union of persons, skill or acts. Firms which were separate remained separate, and each continued to carry on its own business separately. If the statute only condemned such agreements not a word would be said against its constitutionality.

An early and important case, which clearly notes a diversity between combinations which destroy competition, is *Com. vs. Carlisle*, Brightly (Pa.), 36. That noted jurist, Judge GIBSON, says:

"If a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purpose of oppression, but fair competition with others of the same calling. An association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large, and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for the purposes of commerce, or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs which stimulates to competition and enables men to engage in undertakings too weighty for an individual" (p. 40).

In the case of *Central Ohio Salt Co. vs. Guthrie*, 35 Ohio St., 666, thirty or more persons, firms or corporations who were and continued to be engaged separately in the manufacture of salt entered into a pooling agreement for the sole purpose of reglating prices, and for that end placed the business of receiving and distributing the salt manufactured by the different concerns under the control of five persons, to be chosen annually.

The language used by the Court in regard to the restriction of competition must be interpreted with reference to the nature of the agreement, which was a pooling agreement between competitors, and not a union of capital, skill or acts in a partnership.

The same is true of

Emery vs. The Ohio Candle Co., 47 Ohio St., 320.

Morris Run Coal Co. vs. Barclay Coal Co., 68 Pa. St., 173.

India Bagging Association vs. Koch & Co., 14 La. Ann., 168.

U. S. vs. Jellico Coal Co., 46 Fed. Rep., 432.
Lumber Co. vs. Hayes, 76 Cal., 387.
Craft vs. McConoughy, 79 Ill., 346.
Gibbs vs. Gas Co., 130 U. S., 396.

and many others. All were cases of contracts between competing companies which did not unite their capital, skill or acts, but only agreed as to prices and production and pooling of their receipts. As was said by SANBORN, J., in U. S. vs. Trans-Missouri Freight Association, 58 Fed. Rep., 58:

> "In none of those cases were they [the courts] required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

It is easy to refer to a current of cases to show that a multitude of contracts and combinations which restrict competition are legal, not taking into consideration the ordinary commercial partnership, which has never been questioned in any court, nor joint stock associations nor corporations, which are authorized by statute in every State. It is not necessary to cite the cases which hold contracts in reasonable restriction of trade to be legal, although all such contracts are in restriction of competition. The leading case of *Mitchel vs. Reynolds*, 1 P. Wms., 181, held that a contract which clearly restricted competition was not illegal. A multitude of other cases will be found collected in the U. S. vs. Trans-Missouri Freight Association, 58 Fed. Rep., 71 and 72.

In *Marsh vs. Russell*, 66 N. Y., 288, a distinction between legal contracts in restraint of competition and illegal contracts in restriction of trade was clearly set forth as follows:

> "When a lawful business is carried on by a firm its members can regulate the prices at which they will buy and sell.

> * * * Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their article of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a certain price? Such an agreement would certainly not upon its face be unlawful."

Parties associated for a reasonable and honest purpose may agree not to compete (*Phippen vs. Stickney*, 3 Met., 384).

Two firms were competitors in the business of transportation. As such they could not enter into an agreement not to compete or to fix prices. But they agreed to organize a corporation to conduct the business theretofore conducted by the competing firms. Held to be legal (*Lorillard vs. Clyde*, 86 N. Y., 384).

The *Central Shade Roller Co. vs. Cushman*, 143 Mass., 353, holds that competitors may agree to form a corporation for the purpose of preventing competition.

In *Craft vs. McConoughy*, 79 Ill., 346, the Court points out that "a partnership had not been formed for the purpose of trading in grain, but only a secret combination to enable the parties, by secret and fraudulent means, to control the prices of grain."

In *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, the Court says:

> "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the purpose of preventing competition, and the validity of the contract, if supported by a consideration, will turn upon its reasonableness as between the parties.
>
> "Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil."

Leslie vs. Lorillard, 110 N. Y., 519–534.

In *Matthews vs. Associated Press*, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted a by-law prohibiting its members from receiving, or publishing, the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The Court held that the by-law was reasonable and valid. It said:

> "The greater the number belonging to the organization, the larger will be its income, and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. *To suppress competition in such chosen field among themselves* and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other" (p. 341).
>
> "Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality."
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> *Jones vs. Fell*, 5 Fla., 510, 515.
>
> "As a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads and cross mountains and deserts with them; they erect churches, colleges, lyceums and theatres; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for sav-

> ings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing that is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations."
>
> Judge FIELD in Railroad Tax Cases, 13 Fed. Rep., 743.

In the late case of United States vs. Addyston Pipe & Steel Co., 85 Fed. Rep., 271, TAFFT, C. J., reviews a multitude of cases, and endeavors to extract from them established principles on the subject of restraint of trade. The opinion would have been clearer had the proper distinction been drawn between restraint of trade and restraint of competition. It is only under exceptional circumstances, as the opinion clearly shows, that restraint of competition is restraint of trade. As the learned Judge well says, page 280: "when two men become partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise and energy to carry on a successful business and one useful to the community." Again (p. 281) he enumerates several agreements in restraint of competition which are not in restraint of trade, showing further (p. 290) that agreements in restraint of competition are in restraint of trade only where there was no relation of partnership, or of vendor or vendee, or employer or employee between the parties. To this he might have added other relations recognized by law such as corporators, co-owners, joint tenants and tenants in common.

The foregoing citation of authorities is solely for the purpose of showing that which does not seem to be in need of proof, to wit, that associations restrictive of

competition were not void at common law, but that on the contrary combinations restrictive of competition have always been upheld by law, and the right to combine is to be classed among the most important and least questioned liberties of citizens.

When it was held by this Court in United States vs. Trans-Missouri Freight Association, 166 U. S., 290, that an Act of Congress made criminal restraints of interstate commerce whether reasonable or unreasonable, great apprehension was created in the minds of men engaged in trade lest contracts necessary in business and harmful to no one might be found to be criminal. This, possibly, led this Court to say in United States vs. Joint Traffic Association, 171 U. S., 505, "to suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote or indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

But consider what greater apprehension must be felt if now it be held that legislatures may declare criminal contracts and associations restrictive of *competition*, whether they be reasonable or unreasonable; that two men may not enter into any combination or agreement which precludes free and unrestricted competition between themselves or themselves and others; that men may not make any agreement as to prices, nor unite any interest which may affect prices. If the liberty which our Constitution guarantees does not protect the men who conduct the business of this country against such absurd and dangerous legislation, it is but a glittering generality, instead of a safeguard upon which the citizen may rely.

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